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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1949.

No. 461

THE APEX SMELTING COMPANY,
Petitioner,

vs.

WILLIAM S. BURNS, RAYMOND J. BURNS and WILLIAM J. BURNS II, Co-Partners, Doing Business As THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Summary of Argument.

I.

Since contract sued on was made in Illinois, to be performed in Illinois, and injuries suffered were in Illinois, it is governed by law of Illinois. Erie R.R. Co. vs. Tompkins, 304 U.S. 64, 78.. 49

II.

The only relation between the parties is contractual. Whether action is in contract or tort, is to be determined wholly from pleadings. Since it is apparent from complaint that damages which petitioner claims resulted from wilful and malicious conduct of servant of respondents, engaged in performance of duties imposed upon respondents by terms of respondents' contract, petitioner's action is for breach of contract for harm resulting from failure of respondents to provide the protection stipulated for petitioner's plant and property.....49-57

III.

The baleful theory of pleadings has been repudiated by the Federal Rules of Civil Procedure.

Under Rules 8(f), 15(b) and 54(c) of the Federal Rules of Civil Procedure for the District Courts of the United States "all pleadings shall be so construed as to do substantial justice," "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings" and "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. To that end all pleadings shall be liberally construed. 57-62

Under Federal rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis..... 59

Petitioner should not be deprived of relief because of any supposed theory of plaintiff's complaint or supposed theory of the case or supposed change of

theory from negligence to contract on appeal, of which there was none. 62, 63

IV.

Where a person, by his contract, charges himself with a duty or an obligation possible to be performed, he must perform it unless its performance is rendered impossible by an Act of God or the other party 63-71

Under terms of contract between respondents and petitioner, respondents were to furnish an armed guard service for protection of petitioner's plant and property. Supervision of the guards was respondents' responsibility. Respondents were to be at all times responsible for proper functioning of the operation. There were no reservations and no divided responsibility. (See also Point VI, page 93). For performance of this contract respondents must be deemed present, represented by servants, who possessed *pro hac vice* the whole power and authority which made the contract and was bound to keep it. 69, 70, 71

V.

Respondents, under a duty to provide protection for the plant and property of petitioner, having confided the duties imposed upon them by their contract to the guards, who were their servants, became responsible to petitioner for the manner in which they executed the trust, and for the harm caused by the misconduct of their guards, notwithstanding the scope of employment of the guards. 79-92

Under the doctrine of Stranahan Bros. Catering Co. v. Coit, 55 Ohio State 398, 45 N.E. 634, and C. & E. I.

R.R. Co. v. Flexman, 103 Ill. 546, 550, 551, relied upon in the trial court, and Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 331 and Craker v. C. & N. W. Ry. Co., 36 Wis. 657, 669, 670, 673, cited in C. & E. I. Railroad Co. v. Flexman, 103 Ill. 546, and therefore brought to the attention of trial court, when a principal owes to third persons the performance of some duty, as to do or not to do a particular act, and commits the performance of this duty to an agent, the principal cannot escape the responsibility civiliter if the servant fails to perform it, whether such failure be accidental or wilful or whether it be the result of negligence or malice..... 73, 74, 75, 76, 77

As was said in Vannah v. Hart Private Hospital, 228 Mass. 132, 117 N. E. 328, the doctrine of Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 331, applies whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort, the service of its, the defendants' employees 77

That the injury done to the plaintiff is caused by an act of the defendants' servants outside of the servant's duty as an employee of the defendants, but by an act of the defendants' servants, which, while not in the course of servant's employment, is none-the-less a violation of the duty by the defendants under the defendants' contract with the plaintiff, the only action that can be brought is an action founded upon the duty arising out of the contract.....77, 78, 79-92

Under contracts like the one here between respondents and petitioner and the contracts involved in Stranahan Bros. Catering Co. v. Coit, 55 Ohio State 398, 54 N.E. 634; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 331; Craker v. C. & N. W. Ry. Co., 36 Wis.

657; Vannah v. Hart Private Hosp., 228 Mass. 132, 117 N.E. 328, 329, 330 and C. & E. I. R. R. Co. v. Flexman, 103 Ill. 546, 550, 551 and other cases cited under this point, including as well, the bailor and bailee cases cited, the party bound undertakes absolutely to protect the party for whom his employees are rendering service against the wilful and malicious acts or other misconduct of his own servants engaged in executing the contract..... 71-92

VI.

Respondents were independent contractors. Except as petitioner might suggest replacement of guards, who did not fulfill requirements of service, petitioner neither had, retained nor exercised any control over Harry Frontczak or any other guard provided by respondents. There was no divided control..... 93

The test of the master and servant relationship and liability of master for acts of servant at time of occurrence complained of, as set out in Standard Oil Co. v. Anderson 212 U.S. 215 followed by Harrell v. Atlas Portland Cement Co. (C.C.A. 8) 250 Fed. 83, and other cases cited, is the right to control and direct the servant as to how, when and where he should do his work. In other words, not only what shall be done but how it shall be done. In the case here, that right of control of Harry Frontczak and other servants of respondents, as to how, when and where the work was to be done was in respondents who had exclusive control of the work on hand, and not in petitioner 93-105

That the guards were guided by set of rules issued to respondents by petitioner did not make the guards the servants of petitioner.....99, 102, 105, 109

Respondents were to furnish an armed guard service of five or more armed guards. The supervision of the guards was the responsibility of respondents and petitioner looked to them for results. The principal consideration here—the test most often resorted to, is to ascertain whether the one doing the work represents the master as to the result of the work or as to the means. Here, petitioner looked to the respondents only as to results and respondents selected the means. The servants were respondents. Respondents were independent contractors.....105-112

VII.

Petitioner made a *prima facie* case by showing that respondents' unfaithful servant, Harry Frontczak, set out the fires that caused the damages in petitioner's plant. The testimony shows and there is no question, as the Court of Appeals says (Rec. 103), that Harry Frontczak, a guard, while on duty as such, wilfully and maliciously set three fires on the property of petitioner. It rested with respondents to make excuse and justification, if any existed.....112-117

VIII.

Petitioner's theory of liability in the District Court, in the United States Court of Appeals and here, is the same: That respondents, under their contract with petitioner, became responsible for the harm and injury caused by the wilful and malicious conduct of their servant, Harry Frontczak, notwithstanding the scope of his employment. The United States Court of Appeals erred in holding that petitioner tried its case below on the negligence theory and lost and there is nothing that would justify a

reversal of that decision to enable the petitioner to try its case on a different theory..... 118

Where a master or other principal is under duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other agent is subject to liability to such others for harm caused to them by the failure of such servant to perform his duty. This is the doctrine of Restatement of Law of Agency Vol. 1, Sec. 214, pp. 471, 472, and the doctrine of this case, on the basis of the pleadings and the evidence, from the time the suit was instituted and continuously through all the courts, the statements in the prevailing opinion of the United States Court of Appeals to the contrary notwithstanding..... 118

Under the Federal Rules of Civil Procedure 8(f), 15(b), 54(c) and other rules and the doctrine of Stranahan Bros. Catering Co. v. Coit 55 Ohio State 398, 45 N.E. 634 and C. & E. I. R.R. Co. v. Flexman 103 Ill. 546, 550, 551; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 331 and Craker v. C. & N.W. Ry. Co. 36 Wis. 657, 669, 670 and 673, all of which cases the trial court had before it, and Vannah v. Hart Private Hospital 228 Mass. 132, 117 N.E. 328, 329, 330 the theory of petitioner's case was a breach of contract —for damages resulting from the failure of respondents to furnish the service and protection which they agreed to provide, pursuant to the terms of their contract. As the author says, 3 Am. Juris Sec. 253, p. 38, to determine the theory of a case, as presented to the trial court, the Appellate Court will look to the entire record and briefs of counsel and will construe the pleadings on the theory most apparent, most clearly outlined, on the facts stated, and according to their general scope and tenor.....118-126

In any event, under the Federal Rules of Civil Procedure, a case consists, not in the pleadings, but the evidence for which the pleadings furnish the basis 121

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IN THE

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, The Apex Smelting Company, a corporation organized under the laws of the State of Illinois, petitions this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision and judgment of said United States Court of Appeals for the Seventh Circuit, entered on June 24, 1949, affirming a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on the 14th

day of September, 1948, sustaining the motion of defendants (respondents here) for a directed verdict at the close of Plaintiff's (Petitioner here) case.

On the 8th day of July, 1949, petitioner filed a petition for rehearing in the United States Court of Appeals (Rec. 109) which respondents answered (Rec. 137). On the 24th day of August, 1949, petitioner's petition for rehearing was denied (Rec. 145) and said judgment of the United States Court of Appeals thereupon became final.

Decision and Judgment of the Court Below.

The final decision and judgment of the United States Court of Appeals for the seventh circuit, Justice Kerner dissenting, is reported in 175 Fed. 2d at page 978 and appears on pages 101-108 of the record filed herewith. In the District Court, respondents made a motion at the close of petitioner's case for a directed verdict (Rec. 67). The court sustained respondents' motion and instructed the jury to return a verdict finding the defendants not guilty and judgment was entered accordingly (Rec. 81, 85) and petitioner appealed.

Nature of Case and Summary Statement of the Matters Involved.

Petitioner employed respondents to furnish a uniformed guard service for the protection of its plant at 2515-2561 West Taylor Street and 2525-2540 West Fillmore Street, Chicago, Illinois, pursuant to the terms of a written agreement dated February 27, 1943, received in evidence as Petitioner's Exhibit 1 (Rec. 50, 82). On September 8, 1946, Harry Frontczak, one of the uniformed armed guards of the respondents, employed first on Sep-

tember 5, 1946, while active in his duties as a servant of the respondents, wilfully and maliciously set three fires on the property of petitioner. This action was brought by petitioner against respondents to recover for the damages occasioned as a result of these fires.

The Pleadings.

Petitioner filed its complaint against respondents in the Superior Court of Cook County, (Rec. 2). The respondents, non-residents, were served, appeared and filed a petition for removal (Rec. 7) and the case was transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division, by order entered in the Superior Court of Cook County on July 1, 1947 (Rec. 12).

In and by its complaint (Rec. 2) the petitioner alleged it was the owner in possession of certain premises commonly known as 2515-2561 West Taylor Street and 2525-2540 West Fillmore Street, Chicago, Illinois, and was active in the conduct and operation of a large and commodious plant in the manufacture of varied and numerous commodities, that its plant might have care and protection from sabotage and other interruptions of efficient operation, and moved thereto and in consideration thereof, it, on February 27, 1943, entered into a certain writing obligatory with respondents which is set out in the complaint and on the trial was received in evidence as Petitioner's Exhibit 1 (Rec. 3, 50, 82).

Under and by the terms of this agreement (Rec. 3, 50, 82), the respondents obligated themselves: To furnish petitioner with a uniformed armed guard service, consisting of five armed guards or more as might be agreed upon from time to time between the parties for the protection of petitioner's property; To furnish uniforms and equipment, including side arms, belts, holsters and badges;

To assume the social security, unemployment taxes and employers' liability insurance; That the supervision of the guards would be the responsibility of a designated representative of respondents, who in turn would be responsible to and receive instructions from designated representatives of petitioner; That all uniformed representatives of respondents would carry out the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances; and That the supervisor of respondents in charge of the guard force would be responsible at all times for the proper functioning of the operation.

That respondents, on February 15, 1943, had entered upon the performance of said writing obligatory, and on the 5th day of September, 1946, of the uniformed guards so placed by respondents in the care and protection of petitioner's premises as aforesaid, was Harry Frontczak, who, on the 8th day of September, 1946, while active in his duties as the servant of respondents, in, upon and about the premises of petitioner, and coincident therewith, from infirmity of temper and under the influence of passion aroused by real or fancied grievances, did, wilfully, and with intent to wreak vengeance upon petitioner, cause combustion to take place within the premises of petitioner and a conflagration to ensue thereon to the harm and injury of said premises and the contents therein, for which the petitioner prayed judgment in the sum of $20,000.00.

On July 27, 1947, respondents filed a motion to strike and dismiss petitioner's complaint (Rec. 12, 13). On December 1, 1947, the Court denied respondents' motion to strike and dismiss petitioner's complaint without prejudice to the right of respondents to renew said motion on the same grounds at the end of plaintiff's case on the trial of said cause (Rec. 15).

Respondents (Rec. 15) were then ruled to answer and on December 12, 1947, respondents filed an answer (Rec. 16) in which they admitted that petitioner was the owner and in possession of the premises described in paragraph 1 of the complaint and that they entered into the written agreement set out in paragraph 2 of the complaint; stated that Harry Frontczak was one of the guards employed by respondents who was assigned to the plant of petitioner, but averred that any of the acts complained of, suffered or committed by the said guard were not within the scope of said guard's employment, or was he acting within the scope of his employment or were the acts complained of authorized by respondents or were said acts complained of incident to the employment of said guard; and denied that the acts complained of were done by the servant of the respondents, in that said Harry Frontczak was not acting within the scope of, or the course of, or performing any act incident to his employment; and denied that any of the loss or injuries sustained by said petitioner was done or caused by these respondents, or through any act of their agents or servants acting within the scope of their respective employment, and then realleged and set out (Rec. 17) each of the matters that had been set out in their motion to strike and dismiss (Rec. 13) including allegations that the complaint did not charge any act of negligence or any breach of contract on the part of respondents.

The Testimony.

George J. Staszak, maintenance man for petitioner (Rec. 24 and 25) testified that petitioner's premises were located at 2515-61 Taylor Street (Rec. 25); that on the south side of Taylor Street, the buildings ran from T-1 to T-8. Most of the buildings were two stories, some

were three stories, (Rec. 25). On Sunday, September 8, 1946, he went to work at 4:00 o'clock P.M. The guard punched him in at the entrance (Rec. 26). When the crew that was there left at 4:30, he was working at Furnace Number 8 which had just been built. There were no other Apex employees there (Rec. 26). He started performing his duties. His first job was drying out this new furnace (Rec. 26) which he left less than five minutes before the fire (Rec. 26). He met the guard, Frontczak, coming through with his clock (Rec. 26). Staszak then went upstairs to the maintenance room, which he said was their office, where "we get our supplies" (Rec. 27). He took his lunch off the table and opened up a bottle of soda and somebody yelled "Fire" (Rec. 27). He was the only employee of the Apex (petitioner) working at the time and had not gone on any other floor except T-1. He had walked through the plant and shut off the air conditioning (Rec. 27). The guard, Provost yelled "Fire in the East Wing Third Floor" (Rec. 28). Staszak tried to put out the fire (Rec. 28). Provost was the head guard on duty that night at the entrance of the plant (Rec. 28). The first fire he saw was in T-6a on the third floor. He did not see the location of any other fires until after the fireman left. There was a fire in T-1, one on the third floor and one on the second floor (Rec. 28). On cross examination (Rec. 28) Staszak testified that on the evening of September 8, 1946, that besides Frontczak, there was one other guard; besides the guards, he was the only one in the plant (Rec. 29).

On both sides of the railroad there were about 15 buildings (Rec. 29). Staszak said "I can assure you no one else was in that plant because I have to shut off the air conditioning and the air pressure. My duties were

to clean the fire boilers and I have to check the voltage to see the direct current is shut off, and I have to check the oil, check the furnace, and see that the pumps are pumping the right amount of oil and I got a correct pressure on my oil" (Rec. 29, 30). The reason, Staszak said, that he did not see the other two fires was because he was directing the fireman to not get any water in T-8, and we had, I believe it was 13 or 14 furnaces loaded up with 30 or 40,000 pounds of metal and I watched that the fireman did not get any water near, because it would explode (Rec. 30). He was a carpenter by trade (Rec. 25) and had worked there two years prior to September 8th, 1946 (Rec. 30).

Harry James Frontczak (Rec. 31), who set the three fires, called by plaintiff, testified that he was 27 years old, went through grade school, eighth grade and three months of high school (Rec. 31). After he left school, he had odd jobs here and there, his first job was as an elevator operator, about six months (Rec. 31); he worked in the post office two years (Rec. 32); for the surface lines three months—was caught with a girl in a tavern in full uniform, and was discharged (Rec. 32). He had worked as an elevator operator at 333 North Michigan Avenue (Rec. 33), was in the military service of the United States for five months and 11 days (Rec. 33). Of that period they kept him 19 weeks in the Psychopathic Hospital when they gave him a disability discharge on September 26, 1942. He was home a year; he threatened to kill his mother, had fights with his dad; and was sent to the Psychopatic Hospital in Chicago. From there he was transferred to Danville to the Veterans' Administration Hospital. He remained there from January 1944 to July 11, 1944, and was discharged (Rec. 33). He then secured employment in the United States Post Office,

where he worked for two years (Rec. 33). He started to work for the defendant, The William J. Burns International Detective Agency on September 5, 1946, and was assigned to Apex Smelting Works, 2525 Taylor Street, Chicago, hours 4:00 to midnight and on Sundays, 4:00 to 8:00 in the morning (Rec. 34).

He was furnished with a clock to punch, with a gun—a .38 Colt and holster (Rec. 34). The head guard was Provost who had a little place outside the No. 1 building. To get into the premises you have to get permission from the guard (Rec. 34). When he reported for work on September 5, 1946, he had to pull 18 boxes, once every hour (Rec. 34). He said "they gave me a clock, they come to the box. You got a key. You push it out and back fast and it registers what time the box has been punched" (Rec. 34).

In the three buildings on Taylor Street side there were 18 boxes. For walking around, he was furnished with a flashlight (Rec. 35). Except to eat lunch he had no time off during the eight hour service (Rec. 35). It took 45 minutes to make the rounds. Each box has to be pulled once an hour (Rec. 35). He continued his duties on September 6 and 7, 1946, and on September 8th he was supposed to report at 4 o'clock but he reported at 5 P.M. He went to Provost, got his gun and assignment (Rec. 35). He had a cap, badge and uniform. For the first hour after he reported at 5 P.M., on September 8, he made a complete round—complete 18 boxes (Rec. 36). In the second hour he set the building on fire. (Rec. 36). The first fire was by Box Number 3 on the second floor in the East Building (Rec. 36). On the third floor of building T-6 he set a waste basket on fire with oily rags (Rec. 37). He started the fire with a safety

match (Rec. 37). He then went a little further down on the second floor and started another fire. That was in building Number 3, known as T-1 (Rec. 37). The second fire was on the second floor and he pulled the box before he started the fire (Rec. 37). After he started the fire on the second floor, in T-1, he went down to Mr. Staszak, the maintenance man and started to talk to him. After he finished his last box, he started another fire and came back to the chief guard (Rec. 37). That was the third fire on the third floor in building T-1 (Rec. 38). After he had built the three fires, he went downstairs to the Taylor entrance. There he saw a different guard. Provost turned in the fire alarm. At the time he built the fires there was no one on the third floor (Rec. 38). There was no one else on the premises when he built the fire on the third floor of T-1 (Rec. 38). He was employed on September 5, 1946, and this happened on September 8, 1946 (Rec. 39). At the time he built the three fires, Frontczak said he was on duty (Rec. 39).

On cross examination, (Rec. 39) Frontczak testified that he worked for the Bureau of Internal Revenue for six months (Rec. 39), in 1944, when they were short of help—they took anybody to fill in until the war was over.

In March of 1943, he worked for the Pinkerton Detective Patrol (Rec. 40). From there he went to The Burns International Detective Agency (Rec. 40).

Frontczak then testified that he signed a confession in the State's Attorney's office; that he was indicted, tried before Judge Lindsay in the Criminal Court and proved guilty and put on probation for two years (Rec. 42, 43).

Frontczak testified he was employed at 40 East Oak Street in October, 1942 and by the Army Air Force in

the Stevens Hotel for over a year, until the job terminated (Rec. 43). His first job was for the Radio Corporation in the Field Building in March, 1940, (Rec. 44). Since his first job, he was steadily employed. He was married, he said, and had one child (Rec. 44).

He was instructed "to stay in the plant, just pull my boxes and see that nobody comes into the plant to steal anything" (Rec. 45).

Felix Joseph Provost, for petitioner, testified that he had been employed four and a half years by respondents, The Burns International Detective Agency, and was on duty at the Apex plant in September, 1946 (Rec. 45). He recalled Frontczak and saw him first on September 5, 1946 (Rec. 46). For that day, Provost said he was supervisor—for the day and in place of the regular supervisor (Rec. 46). His office was in a coop on the sidewalk in front of 2537 Taylor Street (Rec. 46). He was a guard and reported for work at 4:00 P.M. and worked until 10:30 at night (Rec. 46). He said there were 18 clocks (boxes) on the premises. On September 5th, Frontczak was punching clocks; it takes about three quarters of an hour to punch the 18 clocks. He makes a round every hour. He saw Frontczak on September 6th and 7th. On Sunday, September 8th, Frontczak reported at 4:00 o'clock (Rec. 47). He was getting ready to go home a little after 6:00 o'clock (Rec. 47). Just as he was leaving the premises, he noticed smoke coming out of the window and he called the Fire Department (Rec. 48). He noticed that the Fire Department found a fire on the west end of the building (Rec. 48); that would be in building No. 2. There was a small fire on the second floor and a fire on the third floor. He stayed while the Fire Department was there (Rec. 48). He did not see Frontczak until a couple of hours after he noticed the

fire. He was down there on the sidewalk talking. There was no one else in the building besides the maintenance man and The Burns Detective Agency guard (Rec. 48, 49). With Provost there were three guards on duty at the time of the fire, one on the inside, one on Fillmore Street, and he, Provost, outside on Taylor Street (Rec. 49). The only guard on the inside was Frontczak (Rec. 49). Until the fire, nothing unusual occurred. (Rec. 49).

Walter R. Bayer testified that he was secretary and comptroller of the petitioner Apex Smelting Company, (Rec. 52). He, with the other officers, were responsible for all the business functions of the firm and all the activities (Rec. 52). He was responsible for the financial position of the company, and supervision of all activities that deal with money. He did not take care of purchasing, but he had to approve all payments for items purchased (Rec. 53).

When he left on Saturday, there was no fire (Rec. 53). On Sunday, September 8th, there were three fires. He was notified about 9 nine o'clock and in a half hour he was down at the plant and observed the condition of the premises (Rec. 54). And the next day he contacted contracters and received bids and made arrangements for repairing the building (Rec. 54). They started to restore the building the same evening (Rec. 55). When he got there, there were a half dozen of their employees there and throughout the evening other people came in. At midnight, Sunday, they started cleaning up instead of normal operations (Rec. 56). The witness then testified in detail as to the amounts paid out for certain repairs, which totaled $4,250.92 (Rec. 56, 57). On cross examination, he stated that if there was any objection to any of the guards that Burns, on request, removes them (Rec. 57, 58). Under the contract (Plaintiff's Exhibit

No. 1 (Rec. 50, 82)), Burns furnished the guards and supervised the guards (Rec. 58).

John Schrieber (Rec. 64) testified that he was in the general contracting and building business as the Ensminger Co. Had been in the business 18 years (Rec. 64) engaged principally in remodeling, reconditioning and rehabilitating. He received the contract for restoring buildings T-1 and T-6 from petitioner (Rec. 65), and testified that the total he received for repairing the two buildings was $8,115.12 (Rec. 66).

The total damages sustained as shown by the witnesses, Walter R. Bayer and John Schrieber (Rec. 57, 66) was $12,366.04.

Obfuscation and Confusion of the Courts.

The only relation between the parties in this case was a contractual relation. The contract was embodied in the complaint (Rec. 3) and on the trial received in evidence as Plaintiff's Exhibit 1 (Rec. 50, 82). There was no allegation of negligence but facts were alleged which showed that the respondents were employed pursuant to the terms of their contract, to provide protection for the plant and property of petitioner; that they had confided the performance of such duties to their servants and that harm had come to petitioner's property as a result of the wilful and malicious acts of their guard, Harry Frontczak, who, while on duty as such, wilfully and maliciously set three fires on the property of petitioner. The issue in the trial court, in the United States Court of Appeals and here is whether or not respondents are responsible for the harm caused by the wilful and malicious acts of their employee and servant, Harry Frontczak. Whether the action be treated as *ex con-*

tractu or as *ex delicto,* there was never any other issue in the case. The whole difficulty, seems, however, to be largely in the failure of the Courts to distinguish between wilful and malicious acts and negligence, and when wilful and malicious acts breach a contract. None there should be, however, who would challenge the rule found in the Restatement of the law of agency, Vol. 1. Sec. 214, p. 471 and elsewhere and applicable here, that a Master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duties to a servant or other agent is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

In 38 Am. Jurisprudence Sec. 48 at page 692, the author says:

> "An omission to exercise care which amounts to a lack of regard for the safety of others is wilful or wanton * * * Wilful, malicious or intentional misconduct is not, properly speaking, within the meaning of the term 'Negligence'. Negligence and wilful ness are mutually exclusive terms which imply radically different mental states. 'Negligence' conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge of danger and wilfulness enter is not negligence of any degree, but is wilful misconduct. The term 'negligence' unqualified covers all those shades of inadvertence which range between deliberate intention on the one hand, and total absence of responsible consciousness on the other, but as long as the element of inadvertence remains in conduct, it is not properly regarded as wilful. * * * Wanton misconduct is positive in nature, while mere negligence is materially negative. * * * Wanton misconduct is such as puts the actor in the class with the wilful doer of wrong. * * * "

And respondents' servant, Harry Frontczak, was a wilful doer of wrong, and became such while he was engaged in the discharge of his duties as a guard for respondents in the plant of petitioner. The United States Court of Appeals (Rec. 103) found "The testimony shows and there is no question but that Harry Frontczak, a guard, while on duty as such, wilfully and maliciously set three fires on the property of plaintiff."

Respondents in their motion to dismiss, and in their answer (Rec. 13, 17) say:

"6. The complaint does not charge any act of negligence against the defendants or any of them.

"7. The complaint does not charge any damage suffered by the plaintiff through the negligence of, or as a direct and proximate result of any negligence on the part of these defendants or any of them.

"8. The complaint does not charge any breach of contract on the part of these defendants or any of them.

"9. The complaint does not charge any cause of action against these defendants or any of them."

In answer to these objections, petitioner in its written brief in the trial court on respondents' motion to dismiss the complaint, said:

> "The answer to the above objections of the defense, is that the complaint does allege that the property of the plaintiff was destroyed by the wanton and willful acts of the servant and agent of the defendants, with resulting breach of contract, to the injury of the plaintiff and to its great loss; and from the earliest times it has been the law of Illinois that the master must answer for the willful and wanton acts of his servant."

And the only defense offered is the averment of respondents in their answer (Rec. 16) "that any of the acts complained of, suffered or committed by the said guard were not within the scope of said guard's employment, or was he acting within the scope of his employment or that the acts complained of were authorized by the said defendants, or were the said acts complained of incident to the employment of the said guard."

The only issue tendered, therefore, by whatever name it may be called, was whether respondents' duty to provide protection for the plant and property of petitioner was breached by Harry Frontczak's wilful and malicious acts, notwithstanding that they were not within the scope of his employment.

To demonstrate that the trial court had before it the question of whether or not respondents' contract was breached by the wilful and malicious conduct of respondents' servant, Harry Frontczak, in setting said fires, we direct the court's attention to the first paragraph of petitioner's written brief, submitted to the trial court on respondents' motion to dismiss, as follows:

> "If the court please, before answering the objections of the defense to the complaint in this action, I will state that the claims here are of injuries and loss from the wanton and willful acts of the servant of the defendants, with resulting breach of contract on the part of defendants."

In the course of petitioner's argument in its written brief on petitioner's said motion to dismiss the complaint, petitioner cited *Stranahan Bros. Catering Co.* v. *Coit,* 55 Ohio State 398, 45 N. E. 634, 637, 639 and *Chicago and Eastern Illinois R. R. Co.* v. *Flexman,* 103 Ill. 546, 551, 552.

Again, on the argument of respondents' motion for a directed verdict at the close of the petitioner's case (Rec. 67) counsel for respondents, admitting that respondents were liable for negligence, but denying that they were liable for the wilful and malicious misconduct of their unfaithful servant, at page 77, said:

> "Now, in this case, it is not a matter of defection in the line of duty. I would say this, if he had lit the match and dropped it, then I would say we were liable, and we would not be here. We would have paid the damages. That is not what happened here. He did not do that."

And this was in reply to the argument of petitioner's counsel, wherein counsel for petitioner, referring to the written brief hereinbefore mentioned and to *Stranahan Bros. Catering Co.* v. *Coit*, 55 Ohio State 398, 45 N.E. 634, 637, 638, and *Chicago and Eastern Railroad Company* v. *Flexman*, 103 Ill. 546, 551, 552 (Rec. 76) said:

> "Now we had a number of other cases. Counsel said I cited railroad cases. I cited a case where a man was delivering milk. He was delivering milk to a customer and the driver of the milk truck was dissatisfied with his job and he adulterated the milk. The adulterated milk was delivered to the customer. The milk Company said the man adulterated the milk outside the scope of his employment, but the higher court said that there was liability there becaused they agreed to deliver the milk, regardless of whether the man acted out of the scope of his employment."

In *Stranahan Bros. Catering Co.* v. *Coit*, 55 Ohio State 398, 45 N.E. 634, 637, 638, the Court, by apt illustrations distinguished the cases in which defendant as principal, would be liable and could not escape responsibility for non-performance of duty, and cases of non-liability for torts, not within the scope of the servant's employment and at page 639 said:

"It is important that we keep constantly in mind two controlling facts—one that the relations of the plaintiff and defendant were contract relations, and those between the defendant and Miller were those of Master and servant."

and at page 638 further said:

"It is important to observe a distinction between liability for the malicious acts of an agent with respect to one with whom the principal holds contractual relations—acts affecting the performance of the contract—and with respect to others who may have suffered injury by reason of the agent's torts, as a failure to observe this distinction has resulted in apparent confusion of terms both in text-books and decisions. The distinction referred to is made apparent in an old English case. A traveler employed a livery stable keeper to drive him safely to his destination. The driver purposely and needlessly, to gratify his own personal malice, went out of his way to collide with another carriage, by which one riding therein was injured. The collision also injured the traveler. The action by the former against the master was predicated wholly on the claim that he was liable for the malicious act of his servant, *committed without authority, and not in the line of his service.* An action by the traveler would have rested on the failure of the liveryman to perform his contract. And, as to the latter proposition, Prof. Wharton, in his work on Agency and Agents (section 487), gives this terse rule: 'Principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract.' One principle seems to be well settled by the later authorities, viz.: That if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages."

Another apt illustration which shows the conditions where a principal or Master becomes liable for the wilful and malicious act of its servant and distinguishes such conduct from wilful and malicious torts for which a principal is not liable, is found in *Craker* v. *The Chicago & Northwestern Railway Co.*, 36 Wis. 657. The plaintiff there, a school teacher, about twenty years of age, sued the railroad company for insulting, violent and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while the plaintiff was a passenger on such train. There, also, the defendant admitted liability for negligent acts but denied liability for wilful and malicious acts. At page 673 of the opinion the Court said:

> "We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfil the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum.* The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that is was to protect the respondent against all the world except the conductor, whom

it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subleties in the books could lead us to sanction so vicious an absurdity."

The purpose and the only purpose of citing these cases at this time is to demonstrate, preliminary to the argument in the brief, that the only theory of liability that petitioner ever had in this case, based on the allegations of its complaint, the evidence and argument of counsel as opposed to the only theory advanced by respondents that they were not liable because the wilful and malicious acts of their servant were not within the scope of the employment of their unfaithful servant was the duty of respondents assumed by their contract, to provide protection for the plant and property of petitioner; that respondents having assumed such duty of care and protection became responsible for the harm caused by the conduct of their unfaithful servant notwithstanding the scope of his employment.

Keeping constantly in mind that the relation between respondents and petitioner were contract relations, and those between respondent and Harry Frontczak were Master and servant; that respondents, under a duty to provide protection for or have care used to protect the plant and property of petitioner, confided the performance of such duties to their uniformed armed guards, one of whom was Harry Frontczak, and that harm came to petitioner's plant and property as a result of the wilful and malicious acts of said Harry Frontczak, while on duty as such guard, it is the thesis of this petition and the supporting brief to show that respondents are responsible for the wilful and malicious conduct of their agent and servant, Harry Frontczak, notwithstanding the scope of his employment.

Jurisdiction of This Court.

The judgment of the United States Court of Appeals, Seventh Circuit, to be reviewed was entered on the 24th day of June, 1949 (Rec. 101) and the order denying petitioner's petition for rehearing was entered on August 24, 1949 (Rec. 145) at which time the judgment of the United States Court of Appeals, Seventh Circuit, became final and the jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code as enacted by the 80th Congress, Second Session, effective on September 1, 1948.

Questions Presented.

The questions presented by Petitioner's petition are:

1. When respondents, by their written agreement with petitioner (petitioner's Exhibit No. 1, Rec. 3, 50, 82) without any reservation whatsoever, obligated themselves:

(a) To furnish a uniformed armed guard service of five or more armed guards for the protection of the property of petitioner.

(b) To furnish uniforms and equipment.

(c) To supervise said guards.

(d) To carry out the function of guarding the plant of plaintiff in the manner best suited, depending upon the circumstances.

(e) Through their supervisor, to be *at all times* responsible for the proper functioning of the operation; and

When the testimony shows and there is no question but that Harry Frontczak, one of the respondants' guards, while on duty as such, wilfully and maliciously set three fires on the property of the petitioner.

The Questions properly presented, arising out of the employment of respondents by petitioner to furnish such uniformed armed guard service for the protection of petitioner's plant and property are:

(a) Whether or not respondents are liable for the wilful and malicious acts of Harry Frontczak, which produced the injury.

(b) Whether respondents are liable for the consequences of Harry Frontczak's wilful and malicious acts.

(c) Whether respondents' agreement with petitioner was breached by the wilful, malicious and deliberate acts of respondents' guard while on duty as such, in setting three fires on the property of petitioner with resultant injury and damage to its plant and property?

(d) Whether respondents, bound by their contract and for valuable consideration to them to be paid, to furnish an armed guard service as aforesaid, can escape responsibility for the wanton, wilful and malicious acts of their guard, Harry Frontczak, while on duty as such, in setting three fires on the property of petitioner and for the loss and damage resulting therefrom, on the ground that the acts of said guard, Harry Frontczak were not authorized and not within the scope of his employment?

(e) Whether respondents obligated by their agreement with petitioner to furnish guards for the protection of petitioner's plant and property, having confided the performance of such duty to the uniformed armed guards employed and furnished by them, are liable to petitioner for the loss and damage sustained by petitioner, when one of such armed guards so employed and furnished by them, wilfully and maliciously sets three fires in the plant and property of petitioner?

(f) Whether respondents, obligated by the terms of their agreement with petitioner to furnish an armed guard service for the plant and property of

petitioner, may be regarded as insurers, that the plant and property of petitioner will not be injured, damaged or destroyed by any negligent act, whether of omission or commission, or by any wanton, wilful or malicious conduct on the part of such armed guards while so engaged in the performance of the duties imposed upon respondents by the terms of their agreement with petitioner with respect to the plant and property of petitioner?

2. When it is provided by the written agreement between petitioner and respondents, set out in petitioner's Complaint and received in evidence as petitioner's Exhibit 1 (Rec. 3, 50, 82), that the guards furnished by respondents for the protection of the property of petitioner are:

(a) To be guided by a set of general rules and written instructions issued by petitioner through its designated representatives;

(b) Said respondents assume the social security, unemployment taxes, and employer's liability insurance;

(c) The supervision of the guards will be the responsibility of a designated representative of respondents, who in turn will be responsible to and receive instructions from designated representatives of petitioner; and

Where it was further agreed

(d) That the wishes of petitioner will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirement of the services outlined; and

(e) All uniformed representatives of respondents will carry out the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances,

whether the United States Court of Appeals, in following the District Court and in holding "Plaintiff's breach of

contract theory is far fetched 'Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly.' Thus, not only did the plaintiff, under the terms of the contract, retain possession and control of its premises but it retained a large measure of control over the guards furnished by the defendants, including Frontczak", was not wholly at sea and in error and did not apprehend the true meaning and effect of respondents' contract with petitioner wherein the supervision and functioning of the guards (including Frontczak) was the sole responsibility of the designated representatives of the Agency" (respondents here) and "All uniformed representatives of the Agency" (respondents here) were obligated "to carry out the function of guarding the plant of the Apex Smelting Company (petitioner here) in the manner best suited, depending upon the circumstances."

3. Whether in this action the decision of the District Court below and of the United States Court of Appeals were not both erroneous and in conflict with the applicable decisions of this Court and the Courts of last resort in Illinois, Ohio and other States, in holding that petitioner, claiming on a complaint based forthright upon the contract between petitioner and respondents and in which no negligence on the part of respondents was alleged, tried its case below upon the negligence theory of liability and lost, and "For the first time in the United States Court of Appeals, advanced the theory that respondents were liable for 'breach of contract' and that the record is plain that such a theory was not relied upon below," when it affirmatively appears from petitioner's written briefs presented on respondents' motion to dismiss complaint

(Rec. 76) and from the oral argument in the Court below, upon respondents' motion for a directed verdict, that petitioner's counsel (Rec. 76) cited and relied upon *Stranahan Brothers Catering Co. v. Coit*, 55 Ohio St. 398, 45 N.E. 634, referred to in the oral argument (Rec. 76) as the "adulterated milk case", where the Ohio Supreme Court specifically held that where a principal owes to third persons the performance of some duty as to do or not to do a particular act and commits the performance of the duty to an agent, the principal cannot escape responsibility, if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice; nor is the case altered if it appear that the malice was directed to the Master; and the case of *C. & E. I. R. R. Co.* v. *Flexman*, 103 Ill. 546, 550, 551, 552, referred to in the oral argument of counsel for petitioner and for respondents as the railroad cases (Rec. 72, 76, 77, 78), wherein the Illinois Supreme Court specifically (p. 550) held that "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants and where the Illinois Supreme Court, page 552, further said:

> "so too, the contract which existed between appellant as a common carrier and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal and

justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train."

4. Whether in this action the decision of the United States Court of Appeals is erroneous and in conflict with the applicable decisions of the United States Court of Appeals with respect to the application of Rules 8 (f) 15 (b) and 54 (c) of the Federal Rules of Civil Procedure, providing "all pleadings shall be so construed as to do substantial justice" and "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings" and "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

5. Whether in a claim for relief under the Federal Rules of Civil Procedure, it is necessary for the plaintiff (petitioner here) claiming under a contract with defendants, (respondents here) to do more than set forth its contract, together with a short and plain statement of its claim showing that the pleader (petitioner here) is entitled to relief with a demand for a judgment for the relief to which it (petitioner here) deems itself to be entitled; and whether the complaint of petitioner here (Rec. 2) is such claim for relief.

6. Whether petitioner in its action against respondents, tried to a jury upon petitioner's Complaint (Rec. 2) and respondents' answer thereto (Rec. 16), wherein respondents admit the making of the agreement set out in paragraph 2 of petitioner's complaint (Rec. 3) and that Harry Frontczak was one of the guards employed by respondents and assigned to petitioner's plant but aver that the wanton, wilful and malicious acts of said

guard, Harry Frontczak, in setting said three fires on the property of petitioner, while on duty as such guard, were not done by the servant of respondents, in that said Harry Frontczak was not acting within the scope or course of his employment nor were said acts authorized by respondents, made a *prima facie* case against respondents by proving the setting of said three fires by respondents' said guard, Harry Frontczak, and the resulting damage and injury to the property of petitioner.

Reasons Relied on for the Allowance of the Writ.

I.

This action was instituted forthright on the contract made by respondents with petitioner in Illinois to be performed in Illinois and the injuries of petitioner were suffered in Illinois. The contract is subjoined and *in haec verba* made a part of the complaint (Rec. 2) and sets forth but the mutual obligations and duties assumed by respondents and petitioner, and the promised word of each to the other. The contracting parties are such that their obligations and their duties arose wholly from the contract and none other are added by operation of law. The sanction of the law is that parties fulfill their obligations and perform their promised duties assumed by them only as the contract provides. Thus, and in accord with the contract, petitioner was without right to sue in tort but had only its action in contract.

The answer of respondents (Rec. 16), admitting that they entered into the agreement sued on, and that Harry Frontczak was one of the guards employed by respondents and assigned to the plant of petitioner, asserts that petitioner's complaint charges neither negligence nor breach of contract; that respondents complied with the terms and conditions imposed upon them under the terms and conditions of the contract.

Without denying the wanton, wilful and malicious conduct of their guard, Harry Frontczak, while on duty as such, respondents seek to relieve themselves from liability on the ground that the wanton, wilful and malicious acts complained of, suffered or committed by Harry Frontczak, were not within the scope of his employment and that any loss or injury sustained by petitioner was not done or caused by respondents or through any of their agents or servants acting within the scope of their respective employments. In other words, that irrespective of the purposes of the contract and the duty of respondents to provide care and protection for the plant and property of petitioner in manner and form as specified in said contract, that their contract with petitioner would not and could not be breached by any act of any agent or servant of theirs, no matter how wilful, malicious or baleful, if not suffered or committed within the scope of and in furtherance of his employment.

The issue then, in the District Court of the United States, in the United States Court of Appeals and here, is but the duty and obligation of respondents under their contract to guard, preserve and protect the property of petitioner not only from trespassers from without, but from the wanton, wilful, malicious and baleful acts of their own servants and employees when they depart from the course of their employment and become trespassers from within.

The prevailing opinion of the United States Court of Appeals finds, and correctly so, that "The testimony shows and there is no question but that Harry Frontczak, a guard, while on duty as such, wilfully and maliciously set three fires on the property of plaintiff." But in failing to find that where a principal is bound by contract to do or not to do a particular act and confides the

performance of such duty to an agent or servant, the principal cannot escape responsibility for the harm done if the servant fails to perform it, whether such failure be accidental or wilful or whether it be the result of negligence or malice, the prevailing opinion of the Court of Appeals is untenable, erroneous and not in accord with the applicable decisions of this Honorable Court, the United States Courts of Appeal and the Courts of last resort of Illinois, New York, Ohio, Massachusetts, Wisconsin and other states.

II.

In this case, petitioner set forth *in haec verba* in its claim for relief (its complaint Rec. 2) the contract which it entered into with respondents on February 27, 1943, alleged that respondents were employed so that its plant might have care and protection from sabotage and other interruptions of efficient operation and for a short plain statement of its claim for relief, showing that it was entitled to relief, alleged that respondents furnished the armed guard service provided for in said contract and entered upon the performance of same; that respondents' guard, Henry Frontczak (Rec. 5) so placed on September 5, 1946, on September 8, 1946, wilfully caused combustion to take place on the premises of petitioner to the harm and injury of said premises, and the contents thereof with a demand for judgment in the sum of $20,000.00.

The testimony showed that while Harry Frontczak and other guards of respondents were on duty as such and engaged in the performance of the duties imposed upon them by respondents' contract with petitioner, that said Harry Frontczak wilfully and maliciously set three fires on the property of petitioner with damages to petitioner

in the sum of $12,366.04 (Rec. 57, 60) and plainly established that said fire and damages resulted from a violation of the duty owed by respondents to petitioner under respondents' contract with petitioner, whose duty it was to protect the plant and property of petitioner, from sabotage and other interruption of efficient operation, whether committed by respondent's own guards or by strangers.

On the record and the applicable decisions of this Court, the United States Courts of Appeals and the Courts of last resort, State of Illinois and other states, the plaintiff made a *prima facie* case and the prevailing opinion of the United States Court of Appeals for the Seventh Circuit is in error in holding otherwise.

III.

On a complaint which alleges the employment of respondents to furnish an armed guard service for the protection of petitioner's plant and property from sabotage and other interruption of efficient operation and sets out *in haec verba* the written agreement of defendants with petitioner and shows by apt allegations that the plant and property of petitioner was injured and damaged by the wanton, wilful and malicious act of Harry Frontczak, one of the guards of respondents, while on duty as such in causing combustion to take place on the property of petitioner and testimony that such guard, while on duty as such, did wilfully and maliciously set three fires on the property of petitioner, with consequent injury and damage, can there be any question of petitioner's right to recover for the damages resulting from such wanton, wilful and malicious act of respondents' servant, which constituted a breach of respondents' contract with petitioner to provide a uniformed armed

guard service for the protection of the plant and property of petitioner, to supervise the said guards and carry out the function of guarding petitioner's plant in the manner best suited and through their supervisor to be at all times responsible for the proper functioning of the operation? And that the prevailing opinion of the United States Court of Appeals holding in effect that petitioner may recover neither for breach of contract nor for negligence is not justified.

On the record, and the applicable decisions of this Court, the United States Courts of Appeals and the Courts of last resort of Illinois and other states, the issue was for the jury and the United States Court of Appeals for the Seventh Circuit is in error in ruling otherwise.

IV.

By the terms of respondents' contract with petitioner the guards furnished by respondents were to be regulated by a set of general rules and written instructions issued by petitioner (Rec. 3, 82) through its designated representatives. It was further agreed that the wishes of petitioner would be honored at all times consistent with good judgment in replacing representatives (guards) who did not in the opinion of petitioner fulfill the requirements of the service as outlined. But the supervision of the guards was the responsibility of a designated representative of respondents, who in turn would be responsible to and receive instructions from designated representatives of petitioner. It was agreed that all uniformed representatives of respondents would carry out the function of guarding the plant of petitioner in the manner best suited, depending on the circumstances.

The designated representative of respondents might receive instructions from the designated representative of petitioner. The contract contemplated cooperation and coordination, but the guarding of the plant and property of petitioner in the manner best suited was the work of the respondents who had the sole power to direct and control their servants (guards) in the performance of their work and were responsible for the result.

The United States Court of Appeals by its prevailing opinion, misapprehending and misconstruing said contract and the evidence, erroneously held that here was a guard (Frontczak) who was employed and directed partially by the petitioner and partially by respondents—that he was directed partially by both, to protect this property properly. "Thus not only did the plaintiff under the terms of the contract, retain possession and control of its premises but it retained a large measure of control over the guards employed by the defendants, including Frontczak."

Such holding is not justified by the language of the contract or by the evidence and contravenes the applicable decisions of this court and of the United States courts of appeal.

V.

The decision of the United States Court of Appeals for the Seventh Circuit, in conceding that no negligence was alleged on the part of respondents, but in the holding that notwithstanding petitioner's failure to allege negligence on the part of respondents that "that was the sole theory upon which respondents' liability was sought to be established" and in further holding that "here, for the first time, petitioner advances the theory that respondents were liable for breach of contract," but that no such breach was alleged in the complaint or relied upon below,

is directly contradictory of the decision of the Circuit Court of Appeals for the First Circuit in the case of *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.*, 240 Fed. 573, 579 where negligence was alleged and where the Court specifically held

> "It is also a well recognized rule that, where the only relation between the parties is contractual, the liability, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and that the mere breach of an executory contract, where there is no general duty, is not the basis of such an action."

VI.

The decision of the United States Court of Appeals for the Seventh Circuit, in denying relief to petitioner on the ground that its complaint alleged neither negligence nor breach of contract, that the case was tried on a negligence theory in the Court below, and the petitioner for the first time in the Court of Review, advanced the theory that respondents were liable for breach of contract, is in conflict with rules 8 (f), 15 (b) and 54 (c) of the Federal Rules of Civil Procedure, providing that "All pleadings shall be so construed as to do substantial justice" "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings" and "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings", and the applicable decisions of the United States Courts of Appeal construing said rules 8 (f), 15 (b) and 54 (c) of the Federal Rules of Civil Procedure.

VII.

In this case, petitioner in the Court below, in its written briefs on defendant's motion to dismiss the complaint and on the oral argument, at the trial of the cause, cited and relied upon *Stranahan Brothers Catering Co.* v. *Coit,* 55 Ohio State 398, 45 N.E. 634, referred to in the oral argument as the "adulterated milk case" (Rec. 76) and *C. & E. I. R. R. Co.* v. *Flexman,* 103 Ill. 546, 550, 551, 552, referred to in oral argument as railroad cases (Rec. 72, 76, 77, 78) wherein the Ohio Supreme Court specifically held "that where a principal owes to third persons the performance of some duty as to do or not to do a particular act and commits the performance of such duty to an agent or servant, the principal cannot escape responsibility, if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice, nor is the case altered if it appear that the malice was directed to the Master,"; and wherein the Illinois Supreme Court, in *C. & E. I. R. R. Co.* v. *Flexman,* 103 Ill. 546, 550, 552, citing *Bryant* v. *Rich,* 106 Mass. 180 and *Craker* v. *C. & N. W. Ry. Co.,* 36 Wis. 657 specifically held

> "That the carrier's obligation is to carry his passenger safely and properly and treat him respectfully and if he entrusts the performance of such duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passengers against the violence and insults of its own servants."

Here the facts pleaded and the evidence offered show that respondents' contract with the petitioner was breached by the wanton and wilful acts of respondents' guard, Harry Frontczak, who, while on duty as such,

wilfully and maliciously set three fires on the property of petitioner. The sole defense pleaded and argued by respondents (Rec. 16, 67, 69, 77, 78) that the acts of respondents' guard Frontczak were not within the scope of or furtherance of his employment or authorized so that the Court below, on the pleadings, the evidence and the argument of counsel, was required to determine whether respondents' contract with petitioner was breached by the wanton, wilful and malicious acts of respondents' guard committed while he was on duty as such; and the Circuit Court of Appeals in holding that the petitioner tried its case on a negligence theory below and advanced the contract theory for the first time in the Court of Appeals is in grievous error.

VIII.

The terms of respondents' contract with petitioner are that respondents provide the guards and that the guards so provided guard and protect the plant and surrounding grounds of petitioner from sabotage and other interruptions of efficient operation. This obligation and duty respondents assumed and promised to perform and for the performance of this obligation and duty by respondents petitioner promised respondents good and valuable consideration.

The United States Court of Appeals for the Seventh Circuit in holding that respondents' contract with petitioner was not breached by the wanton, wilful and malicious conduct of respondents' guard in setting three fires on the property of petitioner while on duty as such guard has decided an important question of law with respect to contracts where a duty is imposed upon a principal to do or not to do a particular act in a way which is untenable and in conflict with the weight of authority.

IX.

The United States Court of Appeals for the Seventh Circuit, in holding that respondents' contract with petitioner was not breached by the wanton, wilful and malicious conduct of respondents' guard in setting three fires on the property of petitioner while on duty as such guard has so far departed from accepted and usual procedure in an important matter effecting procedure generally throughout the country as to call for the exercise of the power of supervision by the Supreme Court.

X.

The United States Court of Appeals for the Seventh Circuit, by its decision and judgment in this cause, has denied petitioner a right of recovery upon its contract with respondents where the setting of the three fires by respondents' guard, Harry Frontczak, whose duty it was to guard and protect the plant and property of petitioner, was as much a violation of the duty owed by respondents to petitioner as in a case where the attack is made by a stranger and respondents' guards stand by and do not undertake to protect petitioners' property from attack.

It is respectfully submitted that the denial of such right to petitioner plainly calls for the issuance by this Court of a Writ of Certiorari.

Prayer of Petitioner.

Wherefore, petitioner prays that a Writ of Certiorari be issued by this Court, directed to the United States Court of Appeals for the Seventh Circuit, to the end that the decision and judgment of the United States Court of Appeals for the Seventh Circuit in said cause entitled "The Apex Smelting Company, a corporation, Plaintiff-Appellant vs. William S. Burns, Raymond J. Burns, and William J. Burns II, co-partners, doing business as The William J. Burns International Detective Agency, Defendants-Appellees, Number 9743," be reviewed by this Court as provided by law, and that upon such review, said decision and judgment be reversed and the petitioner have such other relief as to this Court may seem appropriate.

The Apex Smelting Company,
a corporation,
Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1949.

No.

THE APEX SMELTING COMPANY,
Petitioner,

vs.

WILLIAM S. BURNS, RAYMOND J. BURNS and WILLIAM J. BURNS II, Co-Partners, Doing Business As THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

The opinion of the United States Court of Appeals for the Seventh Circuit in said cause No. 9743 entitled The Apex Smelting Company, a corporation, plaintiff-appellant vs. William S. Burns, Raymond J. Burns and William J. Burns II., Co-Partners, Doing Business as The William J. Burns International Detective Agency, defendants-appellees, in which Justice Kerner dissented, and which petitioner seeks to have reviewed is reported in 175 Fed. 2d, 978 and appears on page 101 to 108 of the Record filed herewith.

Statement of the Case.

The essential facts of the case are believed to be fully stated in petitioner's Petition for Writ of Certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of argument which follows. Reference to certain facts not contained in the summary may be referred to in the argument for the purpose of aiding this Court in visualizing the manifest and grievious errors of the United States Court of Appeals for the Seventh Circuit.

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Seventh Circuit in its opinion in said cause erred:

(1) In affirming the judgment (Rec. 108) of the District Court of the United States for the Northern District of Illinois, entered on September 14, 1948 (Rec. 85) in which the Court at the close of petitioner's case (Rec. 84) sustained respondents' motion for a directed verdict and instructed the jury to return a verdict finding the defendants not guilty and entering judgment upon the said verdict.

(2) In holding and deciding that petitioner "tried its case below, on the negligence theory of liability and lost" and for the first time in the United States Court of Appeals advanced the theory that respondents were liable for breach of contract; that the record is plain that such theory was not relied upon below, though from the complaint it appears that petitioner's suit is forthright upon respondents' contract; and that the obligations of respondents arose solely from their contract and the

petitioner was without right to sue in tort, but its only action was in contract, and that the Court below had before it the obligation of respondents under their contract but erroneously rejected such theory of liability in favor of the theory of respondents that the acts complained of, suffered or committed by respondents' guard, Harry Frontczak, were not within the scope of said guard's employment, nor was he acting within the scope of his employment and that the acts complained of were not authorized by respondents nor were they incident to the employment of said guard and directed a verdict for respondents.

(3) In holding and deciding that petitioner may recover from respondents neither upon a theory of negligence nor upon a theory of breach of contract, whereas, the duty of respondents with respect to the guarding of the property and premises of petitioner is the same, whether the liability is claimed as a breach of contract or a failure to perform the duty of care and protection of the plant of petitioner from sabotage and other interruption of efficient operation.

(4) In holding and deciding that irrespective of the duties imposed upon respondents by the terms of their contract with petitioner, petitioner may not recover from respondents for the damages sustained by the petitioner resulting from the wanton, wilful and malicious conduct of respondents' guard, Harry Frontczak, in the setting of three fires on the property of petitioner while on duty as such guard.

(5) In holding and deciding that petitioner's contract theory of recovery from respondents is far fetched and without merit for the reason that though the employment of this guard, Frontczak, was the employment

of the respondents, that the guard is employed and directed partially by petitioner and partially by respondents—but he is directed partially by both to protect petitioner's property properly; that thus not only did petitioner retain possession and control of its premises, but it retained a large measure of control over the guards furnished by respondents, including Frontczak.

(6) In holding and deciding that even though the wanton, wilful and malicious acts of respondents' guard —Harry Frontczak, in setting three fires upon the property of Petitioner, was a violation of the duty owed by respondents under their contract with petitioner to protect petitioner's property properly that it would not be justified in reversing the judgment because the case was neither decided or tried on any such theory.

(7) In holding and deciding that respondents are not liable for the wilful and malicious acts of their guard, Harry Frontczak which produced the injury.

(8) In holding and deciding that respondents are not liable for the consequences of Harry Frontczak's wilful and malicious acts in setting three fires on the property of petitioner.

(9) In holding and deciding, in effect, that respondents' contract with petitioner, which is set out *in haec verba* in petitioner's complaint, was not breached by the wilful and malicious acts of respondents' guard, Harry Frontczak in setting three fires on the property of petitioner.

(10) In holding and deciding that petitioner tried its case below on the negligence theory of liability, even though petitioner in its written briefs in the Court below, on respondents' motion to dismiss and again on respondents' motion for a directed verdict cited and relied upon ***Stranahan Bros. Catering Co.*** v. ***Coit,*** 55 Ohio State 398,

45 N.E. 634, 637, 638 and *Chicago & Eastern R. R. Co. v. Flexman,* 103 Ill. 546, 550, 551, 552, both holding that where a principal owes to third persons the performance of some duty and confides the performance of this duty to his servants, the law holds him responsible for the manner in which he executes the trust.

(11) It (petitioner) may not recover for the reason that the case was tried on the negligence theory of liability below, and that the Court of Appeals would not be justified in reversing it to permit petitioner to again try its case on a different theory.

(12) In overlooking and failing to apply rules 8 (f), 15 (b) and 54 (c) of the Federal Rules of Civil Procedure, providing "all pleadings shall be so construed as to do substantial justice", "when issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings", and "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even though the party has not demanded such relief in its pleadings."

Summary of Argument.

Summary of Argument in this brief follows the subject index preceding Petition for Writ of Certiorari.

PROPOSITIONS OF LAW.

I.

Except in matters governed by the Federal Constitution or Acts of Congress the law to be applied in any case is the law of the State.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 78.

II.

In this case, the only relation between the parties is contractual, and whether the action is one in contract or in tort is to be determined solely from the pleadings.

Attleboro Mfg. Co. v. *Frankfort Marine, etc. Ins. Co.,* 240 Fed. (C.C.A. 1) 573, 579.

D. P. Yonkerman Co. v. *C. H. Fuller's Adv. Agency* (C.C. N. D. I), 135 Fed. 613, 615.

Nevin v. *Pullman Palace Car Co.,* 106 Ill. 222, 235, 236.

Malina v. *Oplatka,* 304 Ill. 381, 385.

The People ex rel. v. *Healy,* 128 Ill. 9, 18.

Carter v. *White,* 32 Ill. 509.

Sherburne v. *The Tobey Furniture Co.,* 19 Ill. App. 615, 619.

Durham v. *Wilson H. Stubbings,* 111 Ill. App. 10, 11.

Mosley v. *Hundhausen,* 211 Ill. App. 627.

Dustin v. *Curtis,* 74 N.H. 266, 268, 67 Atl. 221.

The Korea Maru (C.C.A. 9) 254 Fed. 397, 399.

III.

By the Rules of Civil Procedure for the District Courts of the United States, this baleful theory of pleading has been repudiated. If a plaintiff has stated a cause of action for any relief, the court will grant the relief to which the plaintiff is entitled under the evidence and facts stated.

Federal Rules of Civil Procedure, 8(f), 15(b), 54(c).

Guth v. *Texas Company,* (C.C.A. 7), 155 Fed. (2d) 563, 565.

Cohen v. *Randall,* (C.C.A. 2), 137 Fed. 2d 441, 443.

Truth Seeker Co. v. *Durning,* (C.C.A. 2), 147 Fed. (2d) 54, 56.

Maty v. *Grasselli Co.,* 303 U. S. 197, 200, 201, 82 L. Ed. 745.

Gulbenkian v. *Gulbenkian,* (C.C.A. 2) 147 Fed. (2d) 173, 176.

United States v. *Zara Contracting Co.* (C.C.A. 2) 146 Fed. (2d), 606, 609.

Gins v. *Mauser Plumbing Supply Co.,* (C.C.A. 2) 148 Fed. (2d) 974, 976.

Ring v. *Spina,* (C.C.A. 2) 148 Fed. (2) 647, 653.

United States v. *Pape,* (C.C.A. 2) 144 Fed. (2d) 778, 781.

Moon Motor Car Co. v. *Moon,* (C.C.A.8) 58 Fed. 2d 90, 92.

De Loach v. *Crowley's Inc.,* (C.C.A. 5), 128 Fed. (2d) 378, 380.

IV.

Where a person by his contract charges himself with a duty or an obligation possible to be performed, he must perform it, unless its performance is rendered impossible by an Act of God or by the other party.

Day v. *United States,* 245 U. S. 159, 62 L. Ed. 219, 221.

Jonesboro Compress Co. v. *Mente & Co.* (C.C.A. 8), 72 Fed. 2d 3, 5.

Steele et al. v. *Buck,* 61 Ill. 343, 346.

Deibler v. *Bernard Bros. Inc.,* 385 Ill. 610, 615.

Leonard Auto Car Sales & Service Co., 392 Ill. 128, 187.

Restatement of Law of Agency, Vol. 1, Sec. 214, pp. 471, 472.

Craker v. *C. & N. W. Ry. Co.,* 36 Wis. 657, 674.

V.

Respondents, having obligated themselves, by their contract with petitioner, to provide protection for petitioner's plant and property and to be at all times responsible for the proper functioning of the operation, became responsible, notwithstanding the scope of his employment, for the harm caused by the wilful and malicious acts of their unfaithful servant.

Stranahan Bros. Catering Co. v. *Coit,* 55 Ohio St. 398, 45 N.E. 634.

C. & E. I. Railroad Co. v. *Flexman,* 103 Ill. 546, 550, 551.

Vannah v. *Hart Private Hospital,* 228 Mass. 132, 117 N.E. 328, 329, 330.

Evans v. *Williams,* 232 Ill. App. 439, 443.

McMahon v. *Chicago City Railway Co.,* 239 Ill. 334, 338.

Craker v. *C. & N. W. Ry. Co.,* 36 Wis. 657, 669, 670, 673.

Steamboat Co. v. *Brockett,* 121 U. S. 637, 645, 30 L. Ed. 1049.

N. O. & N. E. R. R. Co. v. *Jopes,* 142 U.S. 18, 25, 26, 27.

Stewart v. *Brooklyn and Crosstown R. R. Co.,* 90 N.Y. 588, 593.

Dwinelle v. *N. Y. C. & H. R. R. R. Co.,* 120 N.Y. 117, 124-127.

Bryant v. *Rich,* 106 Mass. 180, 8 Am. Rep. 331.

Pratt v. *Martin,* 35 S. W. 2d 1004, 1005 (Sup. Ct. Ark.).

Nat. Liberty Ins. Co. v. *Sturtevant-Jones Co.,* 116 Ohio St. 299, 156 N.E. 446, 52 A.L.R. 705.

Wood Law of Master and Servant (1877) Sec. 321, pp. 644, 645.

Restatement of the Law of Agency, Vol. 1, Sec. 214, pp. 471, 472.

VI.

Respondents were independent contractors. Harry Frontczak was their employee and servant. Except as it might suggest replacement of guards who did not fulfill requirements of service, petitioner neither had, retained nor exercised any control over Harry Frontczak or any other guard provided by respondents. There was no divided control.

Standard Oil Co. v. *Anderson,* 212 U.S. 215, 220, 221, 222, 225.

Fuller Co. v. *McCloskey,* 228 U.S. 194, 202, 203.

Singer Mfg. Co. v. *Rahn,* 132 U.S. 518, 523.

Harrell v. *Atlas Portland Cement Co.,* (C.C.A. 8), 250 Fed. 83, 86.

Labbee v. *Travenot S. S. Co. Inc.,* (C.C.A. 2), 37 Fed. (2d) 52, 54.

Texas Co. v. *Brice,* (C.C.A. 6), 26 Fed. (2d) 164, 166, Cert. denied, 278 U.S. 640.

Phelps v. *Boone,* (C.C.A. D.C.), 67 Fed. (2d), 574, 575.

Driscoll v. *Towle,* 181 Mass. 416.

Ozark Minerals Co. v. *Murphy,* 384 Ill. 94, 99.

Foster v. *City of Chicago,* 197 Ill. 264, 268.

Harding v. *St. Louis Stock Yards,* 242 Ill. 444, 450, 451.

Meredosia Levee Dist. v. *Industrial Commission,* 285 Ill. 68, 70, 71.

Olympic Commissary Co. v. *Industrial Commission,* 371 Ill. 164, 171.

Hayes v. *Chicago O. & P. Ry. Co.,* 203 Ill. App. 472, 480.

Rosenbaum Bros. v. *Devine,* 271 Ill. 354, 358, 359.

VII.

Petitioner made a prima facie case. It was error, therefore, for the court to grant respondents' motion for a directed verdict at the close of petitioner's case.

Stranahan Bros. Catering Co. v. *Coit,* 55 Ohio St. 398, 45 N.E. 634.

Vannah v. *Hart Private Hosp.,* 228 Mass. 132, 117 N.E. 328, 329, 330.

Craker v. *C. & N. W. Ry. Co.,* 36 Wis. 657, 669, 670, 673.

Johnson v. *Barber,* 10 Ill. 425, 431.

International Paper Co. v. *General Fire Assur. Co.,* (C.C.A. 2), 263 Fed. 363.

Jacob v. *New York City,* 315 U.S. 752, 756.

Dixon v. *United States,* (C.C.A. 7), 113 Fed. (2d) 640.

Allen v. *Pennsylvania R. Co.,* (C.C.A. 7), 120 Fed. (2d) 63, 64.

Fratta v. *Grace Line Inc.* (C.C.A. 2), 139 Fed. (2d) 743.

Shewmaker v. *Capital Transit Co.* (C.C.A. D.C.), 143 Fed. (2d) 142, 143.

Federal Rules of Civil Procedure, 8(f), 15(b) and 54(c).

VIII.

Petitioner's theory of liability in the District Court, in the United States Court of Appeals, and here, is the same: that respondents, under their contract with petitioner, became responsible for the harm and injury caused by the wilful and malicious conduct of their servant, Harry Frontczak, notwithstanding the scope of his employment. And the United States Court of Appeals erred in holding that petitioner tried its case below on the negligence theory and lost and there is nothing that would justify a reversal of that decision to enable petitioner to try its case on a different theory.

Federal Rules of Civil Procedure, 8(f), 15(b) and 54(c).

Restatement of Law of Agency, Vol. 1, Sec. 214, pp. 471, 472.

Stranahan Bros. Catering Co. v. *Coit,* 55 Ohio St. 398, 45 N.E. 634, 637-639.

Chicago & Eastern Ill. R. R. Co. v. *Flexman,* 103 Ill. 546, 551, 552.

Bryant v. *Rich,* 106 Mass. 180, 8 Am. Rep. 331.

Craker v. *C. & N. W. Ry. Co.,* 36 Wis. 657.

N. O. & N. E. R. R. Co. v. *Jopes,* 142 U.S. 18 25, 26, 27.

DeLoach v. *Crowley's, Inc.,* (C.C.A. 5), 128 Fed. (2d) 378, 380.

Gins v. *Mauser Plumbing Supply Co.,* (C.C.A. 2), 148 Fed. (2d) 974, 976.

3 Am. Juris., Sec. 253, p. 38.

ARGUMENT.

I.

Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the State.

Petitioner filed its suit in the Superior Court of Cook County. The respondents, who were residents of the State of New York (Rec. 8), after service, entered their appearance, and on their petition, said cause was removed to the District Court of the United States for the Northern District of Illinois, Eastern Division (Rec. 12). The agreement between respondents and petitioner was made in Illinois (Rec. 3); it was to be performed in the State of Illinois (Rec. 2, 3); the injuries of petitioner were suffered in Illinois; and the law of the case to which we may look and which control under *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 78, is the law of the State of Illinois.

II.

In this case, the only relation between the parties is contractual, and whether the action is one in contract or in tort, is to be determined solely from the pleadings.

With respect to petitioner's complaint the prevailing opinion of the United States Court of Appeals (Rec. 104) found:

> "It is difficult to discern from the complaint the theory upon which liability is sought to be predicated. True, the complaint sets forth a contract entered into by the parties, but there is no allegation of the breach of same, and neither is there any allegation that plaintiff's alleged damage was caused by

> the negligence of defendants' agents, servants or employees acting within the scope of their authority or employment."

And then the prevailing opinion (Rec. 105) of the Court continues:

> "Notwithstanding plaintiff's failure to allege negligence on the part of the defendants, that was the sole theory upon which defendants' liability was sought to be established."

The prevailing opinion of the Court (Rec. 105) continues:

> "We need not pursue this negligence theory further, however, because it is no longer relied upon. Here, for the first time, plaintiff advances the theory that defendants were liable for a breach of contract."

By the contract, made a part of the complaint (Rec. 3), and received in evidence as Plaintiff's Exhibit 1 (Rec. 50, 82), respondents were employed and undertook to furnish protection for the plant and property of petitioner and the complaint so alleges; respondents confided the duties imposed upon them by the terms of their contract to their servants, their armed guards, one of whom was Harry Frontczak; and he, as petitioner alleged in its complaint, on the 8th day of September, 1946, wilfully and maliciously caused combustion to ensue thereon, to the harm and injury of said premises and the contents therein (Rec. 5); and the plaintiff claimed damages.

The damages claimed resulted from the failure of respondents to provide the protection which they contracted to give. Whether the failure to provide such protection was claimed in an action *ex delicto* with allegations of negligence or in an action *ex contractu* with no allegations of negligence the result would be the same. As the Court said in *The Korea Maru* (CCA 9), 254 Fed. 397, at page 399, where the owners of the steamship Korea Maru

were sued by passengers for hire for injuries sustained during a storm:

> "We come then, to the general charge of negligence, the character of which, with respect to the duty of a carrier to a passenger, is the same, whether the liability of the carrier is claimed as a breach of contract or as a failure to perform the duty of a carrier."

So here, respondents were sued for the harm resulting from the wilful and malicious conduct of their servant, Harry Frontczak, while on duty as such, when he set three fires in the plant and property of petitioner. Whether it be regarded as a breach of contract or a tort it was nonetheless a failure of respondents to furnish the care and protection that they were required to provide by the terms of their contract.

Petitioner, however, maintains that its suit was instituted forthright on the contract of respondents with petitioner, and so patently so that the most obtuse may observe the fact. The complaint, in which the contract is set out in full, but set forth the mutual obligations and duties assumed by respondents and petitioner and the promised word of each to the other. The contracting parties were such that their obligations and their duties arose wholly from the contract and none other were added by operation of law.

The sanction of the law is, that the parties fulfill their obligations and perform their promised duties as assumed by them only as the contract provides the same. Thus, under and in accord with the contract, the petitioner was without the right to sue in tort but had only its action in contract.

The prevailing opinion of the United States Court of Appeals here is in conflict with and exactly contrary to

the decision of the United States Court of Appeals for the First Circuit in the case of *Attleboro Mfg. Co.* v. *Frankfort Marine, etc., Ins. Co.*, 240 Fed. 573. Here the Court holds that petitioner's action was in tort and was tried as a tort action; whereas in *Attleboro Mfg. Co.* v. *Frankfort Marine, Etc. Ins. Co.*, 240 Fed. 573, where an action was brought by the plaintiff against the Insurance Company to recover damages alleged to have been suffered by plaintiff through the defendant's negligence in failing to properly defend a lawsuit against plaintiff, which the plaintiff contended the defendant was required to defend by the terms of the insurance policy issued by plaintiff to the defendant, the contention was made by the defendant in the Court of Appeals that plaintiff's action as set out in the several counts of its declaration sounded in contract and not in tort. There each of the counts of the declaration alleged negligent performance of duties imposed by the terms of the insurance contract. And the Court at page 579 said:

> "The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter, as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon them by law."

The contract of insurance but showed the relationship between parties without which there would have been no obligation on the part of the defendant to act. And then the Court at page 579 further said:

> "It is also a well-recognized rule that, where the only relation between the parties is contractual, the

liability of one to the other, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and that the mere breach of an executory contract, where there is no general duty, is not the basis of such an action."

In that case the plaintiff alleged negligent performance of duties imposed by law and the suit was properly held an action in tort. Here, the suit of the petitioner is against the respondents upon the contract for failure to guard the plant and premises in the manner provided for by the terms of the contract. The respondents were not charged with negligent performance of the contract, but that which happened and for which the petitioner claimed damages resulted from the failure of respondents to perform the duties imposed upon them by the terms of their contract, which they had confided to their agents and servants, one of whom was Harry Frontczak.

To the same effect is *D. P. Yonkerman Co.* v. *C. H. Fuller's Adv. Agency* (C.C. N.D.I.), 135 Fed. 613, where a demurrer was filed to an amended declaration on the ground that the amended declaration was framed as an action of trespass on the case while the original proceeding was an action of trespass on the case upon promises.

In the case of *Nevin* v. *Pullman Palace Car Co.*, 106 Ill. 222, 235, 236, where an action in case was brought by Nevin against the sleeping car company for refusing to permit him to occupy a berth in one of its cars which had been assigned to him, and which he was ready and offered to pay for. A demurrer to his declaration was sustained in the trial court and by the Illinois Appellate Court and reversed by the Illinois Supreme Court. The contract between the company and the plaintiff, the Court

held, established a special relation between them such as that between carrier and passenger, but none of the duties were expressly stipulated for, for the simple reason that the law implies them from the relation of the parties created by the contract securing the berth; and for such a breach of any of these implied duties, it is clear, case is a concurrent remedy with assumpsit; that wherever there is a contract and something to be done in course of employment which is the subject of that contract, if there is a breach of the duty in the course of that employment, the plaintiff may recover either in tort or in contract. Tort lies for the breach of a common law duty. The law makes it the duty of every one to perform his contract and, it is clear, case will not lie for the breach of every duty created by contract. Case lies only for the breach of such duties as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract, it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it could have existed by reason of such relations without such stipulation.

> "The general principle (page 236) seems to be this: Where the duty for whose breach the action was brought would not be implied by law, by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort—when otherwise, case is an appropriate remedy."

To the same effect is *Dustin* v. *Curtis,* 74 N.H., 266 268, 67 Atl. 22.

In this petition for certiorari the duties of respondents were expressly stipulated for and the remedy is in contract and not in tort.

In the case of *Malina* v. *Oplatka,* 304 Ill. 381, suit was brought in the Municipal Court of Chicago for the sum of $5006.00. By statute the jurisdiction of that Court in tort was limited to the sum of $1000.00. The question was whether the complaint was in contract or in tort. The Court, page 385, said:

> "The form of action is to be determined by the pleadings."

And further said:

> "While it (the complaint) sets out the agreement under which defendant in error claims his right to have his wall protected, it neither avers any contractual obligations on the part of the plaintiffs in error nor any breach of contract by them."

The Court held that the complaint showed a cause of action in tort and that the case was tried and a judgment entered on the theory that the matters involved were *ex delicto* and reversed a judgment in favor of the plaintiff for the reason that the Court was without jurisdiction.

Again, in *The People ex rel.* v. *Healy,* 128 Ill. 9, where a petition for mandamus had been filed in the Supreme Court to compel the Clerk of the Superior Court of Cook County to issue an alias *capias ad satisfaciendum* against the body of one Elias Levee, upon a judgment in that court in favor of petitioners and against said Levee. Had the original action been in tort, petitioner was entitled to a *capias.* The judgment had been obtained by default.

And the Court at page 14 said:

> "We must therefore look to the allegations of the declaration, which is made an exhibit, rather than to the form of action adopted by the pleader, to ascertain the nature of the cause of action."

and, holding that the action was in contract and not in tort, the Court denied the petition.

In the case of *Durham* v. *Wilson H. Stubbings,* 111 Ill. App. 10, where after a verdict was returned, the plaintiff below asked leave to amend the praecipe, summons and declaration from case to assumpsit by "striking out the words 'trespass on the case' and inserting in lieu thereof the word 'assumpsit'."

No amendments were in fact made but the case was treated by counsel as though the amendments were made, as to whether the suit was one in assumpsit or in case, the Court at page 11 said:

> "To determine the cause of action, whether for tort or on promise, we must look to the declaration. *Carter et al.* v. *White,* 32 Ill. 509; *Sherburne* v. *The Tobey Furniture Co.,* 19 Ill. App. 615, we think an examination of the substance of the declarations in this case clearly showed that they were in assumpsit."

And again, in the case of *Mosely* v. *Hundhausen,* 211 Ill. App. 627, the Court said.

> "An action in contract is for the breach of a duty arising out of the contract express or implied, while an action in tort is for the breach of a duty imposed by law. If it is not clear to which class an action belongs, whether contract or tort, the action will ordinarily be considered as one in contract."

In Illinois, the law of which is controlling here, it is clear from an examination of the contract made a part of petitioner's complaint that the rights of the parties here depend upon the duties stipulated in the contract; that no negligence is alleged and that the facts alleged show a failure on the part of respondents to perform the duties imposed upon them by the terms of that contract. The action, therefore, is one in contract and not in tort. Furthermore, as heretofore shown, it does appear that the decision of the Court of Appeals here is in direct con-

flict with the decision of the United States Court of Appeals in *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.*, 240 Fed. (CCA 1) 573, 579.

III.

By the Rules of Civil Procedure for the District Courts of United States, this baleful theory of pleading has been repudiated. If a plaintiff has stated a cause of action for any relief, the court will grant the relief to which the plaintiff is entitled under the evidence and facts stated

By Rule 8 (a) of the Federal Rules of Civil Procedure instead of complaint, the words "Claims for Relief" are used and it is provided that a pleading setting forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled"; by Rule 8 (f) that "All pleadings shall be so construed as to do substantial justice"; by Rule 15 (b) "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." And by Rule 54 (c) that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Petitioner, in its complaint (Rec. 3) set out respondents' contract, in which it is alleged that it entered into the contract (Rec. 3) so that its plant might have care and protection from sabotage and other interruption of efficient operation; that the respondents (Rec. 5) assumed

the duties imposed upon them by the terms of the contract by entering into the performance of said contract and furnishing the guard service provided for; and "that on or about September 5, 1946, of these uniformed armed guards, so placed by the defendants in the care and protection of plaintiff's premises, aforesaid, one, Harry Frontczak (Rec. 5), or about the 8th day of September, 1946, while active in his duties, as a servant of the defendants, in upon and about the premises of petitioner, and coincident therewith, from infirmity of temper, and under the influence of passion aroused by real or fancied grievance, did wilfully and with intent to wreak vengeance upon the plaintiff", cause combustion to take place within the premises of the plaintiff and a conflagration to ensue thereon, to the harm and injury of said premises and the contents therein", with an allegation of damages and a prayer for judgment.

The allegations of the complaint implement an action for breach of contract for damages to petitioner's plant and property resulting from the failure of respondents to provide the care and protection stipulated for by the terms of their contract. The evidence showed that the contract was breached by the wilful and malicious conduct of Harry Frontczak, a guard, while on duty as such, in setting three fires on the property of petitioner. The theory of the complaint and the theory of the case, as already pointed out, in the trial court, in the court of appeals and here, is the breach of respondents' contract by the wilful and malicious acts of their guard, Harry Frontczak, while on duty as such.

In *Guth* v. *Texas Company* (CCA 7), 155 Fed. (2d) 563, the opinion is by Judge Minton. The Court, at page 565, said:

"The plaintiff's complaint must be held sufficient if upon any view of the allegations he had stated facts sufficient to entitle him to relief." (Citing cases.)

In *United States* v. *Pape* (CCA 2), 144 Fed. (2d) 778, which was a criminal case, defendant argued that the position taken was not the theory upon which the prosecution proceeded. The Court at page 781 said:

"In Civil Procedure some vogue has been had for the baleful 'theory of pleadings' or 'theory of the case' doctrine, now happily repudiated under the new civil rules. (Citing cases) But it does not seem to have had place in criminal procedure.'

In *DeLoach* v. *Crowley's Inc.* (CCA 5), 128 Fed. 2d 378, the Court at page 380 said:

"Under the rules of civil procedure, a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than on the pleadings. • • • But the principle is no longer of force that the pleadings will be construed strictly against the pleader. Rule 8 (f) says that 'all pleadings shall be so construed as to do substantial justice.' "

Cohen v. *Randall* (CCA 2), 137 Fed. 2d 443, involved a decree of divorce and the court at page 443 said:

"The issue, however, must be broadened to include the question whether the divorce decree can be here attacked, since, the plaintiff, having stated her facts extensively and the defendant having appeared, the court must now give her whatever relief the facts justify without respect to her formal demand. Federal Rules of Civil Procedure, Rule 54 (c) 28 U.S.C. C.A. following Section 723."

In *Truth Seeker Co.* v. *Durning* (CCA 2) 147 Fed. 2d 54, the plaintiff in its complaint sought a peremptory or alternative Writ of Mandamus against the collector of

customs, to compel the defendant to admit certain books and publications after the assessment and payment of any proper fees. Concerning the theory of plaintiff's complaint, the court at page 56 said:

> "Now it is quite clear, in view of the ancillary nature only, the federal mandamus 'except in the District of Columbia,' that the plaintiff's suggestion of *mandamus* as a remedy is unsound. (Citing cases) But plaintiff has made its allegations full and complete, and has in fact, asked, in addition to an order for the return of the material for 'such other and further relief as to the Court may seem just and proper.' Moreover, without reference to its prayer, it is entitled to the relief to which the stated facts entitle it, even though its own theory of relief may have been unsound. F. R. C. P. 54 C.; U.S. for the use of *Susi Cont. Co.* v. *Zara Cont. Co.* (CCA 2) 146 Fed. 2d), 606 and cases cited."

And in *Gulbenkian* v. *Gulbenkian,* (CCA 2) 147 Fed. (2d) 173, the Court at page 176, said:

> "The trial judge, as shown by his opinion, denied the plaintiff damages on two grounds: (1) that the 'defendant's right to a trial cannot be defeated by plaintiff suing upon a stated claim for strictly equitable relief and then by motion to amend the pleadings to conform to the proof secure a judgment for damages for breach of contract'; and (2) that proof of damages was insufficient even if the court had power to award them. Neither ground is sustainable.
>
> "Under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, all pleadings shall be so construed as to do substantial justice, Rule 8 (f); legal and equitable claims may be joined Rule 18 (a); pleadings may be freely amended to conform to the proof, Rule 15 (b); and every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief was not demanded in his pleadings, Rule 54 (c)."

In *Ring* v. *Spina* (CCA 2) 148 Fed. (2d) 647, the Court at page 653 said:

> "But plaintiff is entitled to state detail if he chooses and rely upon the Court to award him such judgment as his case deserves; and at the trial he will not be bound by his prayers. F.R.C.P. 54c 28 U.S.C.A. following Sec. 723. *Truth Seeker Co.* v. *Durning* (CCA 2) 147 Fed. (2d) 54 U.S. for use of *Susi Cont. Co.* v. *Zara Cont. Co.*, 2 Cir. 146 Fed. (2d) 606."

In *Gins* v. *Mauser Plumbing Supply Co.*, CCA 2d 148 Fed. (2d) 974, concerning plaintiff's complaint, which had been framed in five separate "causes of action" followed by a demand for judgment in fourteen different paragraphs, the Court at page 976 said:

> "A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not. Federal rules of Civil Procedure, 54c 28 U.S.C.A. following Sec. 723c" and cases cited.

In *Moon Motor Car Co.* v. *Moon* (CCA 8) 58 Fed. (2d) 90, at page 92, the Court said:

> "If this action had been one for an accounting as it apparently should have been, (citing cases) the evidence would seem sufficient to call for an explanation for defendants and some proof of their authority to draw this money from the treasury of plaintiff. If the action should be considered as one at law, we think the evidence was such that a verdict should not have been instructed at the close of the plaintiff's case, but that defendants should have been put upon their proof.

> "The arguments here on the part of defendants are rather technical. We are not impressed with the argument that plaintiff must show the particular coin or paper taken in order to recover under its petition. Whatever the action may be called, plaintiff is trying to recover for moneys which it claims were wrongfully taken from it by its officers. It does not seek to recover the specific coins or paper money. There is no earmarked money involved, but it asks for judgment for the value of the property taken. If it erroneously terms its action one at law, its rights, if any it have, should not be defeated by technical error as to the form of action."

And in *Maty* v. *Grasselli Co.,* 303 U.S. 197 at page 200, the Court said:

> "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same place of employment, the same injury, and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

It is fully apparent from the cases cited that the petitioner should not be deprived of relief because of any supposed theory of plaintiff's complaint, not supported by anything which appears in the complaint, itself, nor by any supposed theory of the case on the trial or any supposed change of theory from negligence to contract on the appeal from the District Court to the United States Court of Appeals. Petitioner sought relief for the harm caused by the wilful and malicious acts of respondents' servant, Harry Frontczak. It was

the duty of respondents to furnish protection and care for the plant and premises of petitioner and petitioner should not be deprived of relief on any baleful theory of the pleadings nor upon the negligence theory of respondents that it was the duty of respondents' servants to protect the petitioner's plant and property against all the world except the servants of respondents whom they appointed to protect petitioner's property.

IV.

Where a person by his contract charges himself with a duty or an obligation possible to be performed, he must perform it, unless its performance is rendered impossible by an Act of God or by the other party.

By their contract, Plaintiff's Exhibit 1 (Rec. 50, 82, 83) respondents were to provide full care and protection from sabotage and other interruption of efficient operation of the plant and property of petitioner. They obligated themselves without any reservations whatsoever:

(a) To furnish a uniformed armed guard service, for the protection of the property of petitioner;

(b) To furnish uniforms and equipment:

(c) The supervision of the guards was to be the responsibility of respondents.

(d) All uniformed representatives of the respondents were to carry out the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances.

(e) The supervisor in charge of the guard force to be at all times responsible for the proper functioning of the operation.

Respondents were independent contractors. The only check, curb or control of any kind that petitioner had over

the guards placed by respondents, was the provision of the contract that "the wishes of petitioner will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the services outlined." (Rec. 83). This was ineffective, unless respondents' "good judgment" happened to coincide with the petitioner's wishes.

There was no divided responsibility, nor divided control. This will be treated at length under point VI, pages 46, 93 of this brief. Harry James Frontczak, (Rec. 31, 44), the uniformed guard of respondents, who set the fires while on duty as such guard, which caused the damage for which petitioner sued was hired by respondent and assigned to the plant of petitioner on September 5, 1946 (Rec. 34). He started work on Thursday, September 5, 1946, and on Sunday, September 8, 1946, set the fires which caused the damage in petitioner's plant and building (Rec. 36). The decision of the United States Court of Appeals quotes from the opinion of the trial court (Rec. 106) and reads:

> "As stated by the court below, here is a guard who was employed and directed partially by the plaintiff, and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both to protect this property properly. Thus, not only did the plaintiff, under the terms of the contract retain possession and control of its premises but it retained a large measure of control over the guards furnished by the defendants, including Frontczak."

This statement of the United States Court of Appeals is not in any sense supported by any provision of the contract, nor by the evidence. On the contrary, the court's statement is in direct conflict with the positive and affirmative provisions of respondents' agreement making the "supervision of the guards" the "responsibility of

a designated representative of the agency." (Rec. 3, 83) and "all uniformed representatives of the Agency will carry out the function of guarding the plant" in the manner best suited and "The supervisor in charge of the guard force to be responsible at all times for the proper functioning of the operation" (Rec. 4, 83). This will be treated somewhat more extensively under point VI at pages, 46, 93 of this brief.

With the exception of George J. Staszak, the maintenance man for petitioner, and respondents' uniformed armed guard, Harry Frontczak, there was no one else in the plant (Rec. 29). Frontczak confessed, was indicted, proved guilty and put on probation (Rec. 42, 43). It is not claimed that Staszak was in any manner implicated in the setting of the fires.

By contract, or by entering into certain relations with others, a person may become responsible for the harm caused to them by conduct of his agents or servants, notwithstanding the scope of employment, the extent of the liability depends upon the duty assumed. Restatement of Law of Agency, Vol. 1, Sec. 214, p. 471. Among such relationships are (1) agent, factor broker. (2) Bailee (3) Bank and customer (4) Carrier of goods (5) Carrier of passengers (6) Inn keeper (7) Landlord and tenant (8) Master and servant and numerous others.

In most of these relationships the principal becomes liable for the acts of his agents and servants, notwithstanding the scope of employment, and the bailee and carrier and passenger relationships are outstanding examples. Respondents, by their uniformed armed guards, in charge of their supervisor, had the duty of care and protection of plaintiff's plant and property and respondents, through their supervisor in charge of the guard

force made themselves responsible at all times for the proper functioning of the operation. Respondents' responsibility in this respect was not shared with petitioner.

One of the early cases in Illinois, in which the principle, relied upon here, is enunciated, is the case of *Steele* v. *Buck*, 61 Ill. 343. This was an action of debt on a bond given by Charles Vogell and William B. Crandall as principals with the appellant Steele as surety to secure the performance of the covenants of a charter party bearing even date with the bond. Vogell and Crandall were to have the exclusive use and possession of the propeller "Equator" to man and run during the season of 1869 to be employed in the business of commerce and navigation upon the lakes and navigable waters connecting the same, for which a stipulated price was to be paid and in addition thereto, it contained an express covenant that they would deliver the propeller at the port of Chicago, at the close of the navigation season for that year, in as good and sound condition as she then was, reasonable use and wear excepted. They failed to return the propeller. The Court held that where the party may perform the contract and has not provided for the dispensation, the law will not do it for him. And where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. After citation of authorities with illustrations the Court at page 348, said:

> "The reason given for the rule is, that when, if an event happen which will occasion loss to one or the other contracting parties, yet the party who contracts that the event shall not happen, although he may be unable to perform his contract by reason of an act of God, he shall stand the risk and make

> good the loss. The party contracting assumes the responsibility for the consequences that may follow; if for any cause whatever, he may be unable to perform his contract. He is an insurer to the extent of making good the loss."

In *Day* v. *United States,* 245 U.S. 159, 62 L. Ed. 219, in which the contractor filed a claim for additional work and materials furnished to build a bulk head and temporary dams to protect a canal and locks at the Cascades of the Columbia River, against an extra ordinary flood, the Court said:

> "One who makes a contract never can be absolutely certain that he will be able to perform when the time comes and the very essence of it is that he takes the risk within the limits of his undertaking. • • • But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

To the same effect is *Jonesboro Compress Co.* v. *Mente & Co.,* (C.C.A. 8) 72 Fed. 2d 3, 5, where many supporting cases are cited.

In *Diebler* v. *Bernard Bros. Inc.,* 385 Ill. 599 the defendant, Bernard Bros. Inc. entered into a lease with May H. Diebler, for certain premises in the City of Highland Park, Illinois, and defaulted in the payment of the rent. Judgment was confessed and the judgment vacated on the ground that performance of the lease had been rendered impossible by the acts of certain administrative officials of the Federal Government by reason of which the lease was terminated by operation of law. At page 615 of the opinion, the Court said:

> "This question was first presented to this court many years ago in *Bunn* v. *Prather,* 21 Ill. 217. It was there said, quoting from Chitty on Contracts,

'It is a familiar principle of law' that when the law casts a duty on a party, the performance shall be excused by act of God; but when a party, *by his own contract,* engages to do an act, it is deemed his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events; and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident, or other contingency, although not foreseen, by or within the control of the party."

"In *Dehler* v. *Held,* 50 Ill. 491, it was said, 'as a general rule, where a party binds himself to perform an act, he is held to its performance, except where it is rendered impossible by the act of God or the public enemy. The mere fact that it may be inconvenient, or attended with loss, is no excuse.'

"It is elementary law that, when the contract is to do a thing which is possible in itself, the promisor will be held liable for a breach thereof, notwithstanding it was his own fault to run the risk of undertaking to perform any impossibility, when he might have provided against it by his contract. (*Walker* v. *Tucker,* 70 Ill. 527.) The general doctrine is that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good. Inevitable contingencies afford them no relief, for they are regarded as insurers to the extent of making good the loss."

It is clear, it would seem, from the principles enunciated in *Steele* v. *Buck,* 61 Ill. 343, 346; *Day* v. *United States,* 245 U. S. 159, 62 L. Ed. 219, 221 and *Deibler* v. *Bernard Brothers,* 385 Ill. 599, 615, what the court should hold when these principles are applied to the defendant's contract here to "carry out the function" of guarding the plant of petitioner, "in the manner best

suited depending upon the circumstances" and to be "responsible at all times for the proper functioning of the operation."

It rested upon respondents to perform their contract with the petitioner by guards of their own choice. They chose the guards here, including Frontczak, to perform their contract with petitioner. They put Frontczak and the other armed guards in petitioner's plant. Their supervision was the responsibility of the designated representative of the Agency and respondents, through their supervisor, obligated themselves to be at all times responsible for the proper functioning of the operation. There was no sharing of responsibility between petitioner and respondents with respect to the guards as we shall show in more detail under point VI, p. 93 of this brief.

Frontczak started to work on Thursday, September 5, and three days later, on Sunday September 8th, he set the fires. There was neither obligation nor opportunity on the part of respondent to investigate or determine the fitness of Harry Frontczak or his supervisor, Felix Joseph Provost (Rec. 45). For these uniformed armed guards, respondents bound themselves absolutely. Respondents could delegate to their agents and servants, to these uniformed armed guards, the work of actually guarding the premises but respondents were responsible under their contract for the performance of the duties which they had confided to their agents and servants. That responsibility they could neither delegate nor share.

Leonard v. *Auto Car Sales & Service Co.*, 392 Ill. 182 cites the *Diebler* case and at page 187 of its opinion, the Court, concerning the construction of the lease contract there involved said:

> "They are well established and the general rule is that where parties by their own contract and

positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and subsequent contingencies not provided for in the contract, which do not render the performance impossible, do not bring the contract to an end."

By entering into the contract and assuming the duties imposed upon them by the terms of their contract, respondents became responsible for harm caused to the property and premises of petitioner by the conduct of their agent and servant, Harry Frontczak, notwithstanding the scope of his employment. They contracted as well against the wilful and malicious acts of Harry Frontczak as they might against their own wilful and malicious acts. The contract provides that the supervision of the guards will be the responsibility of a designated representative of the agency and that the supervisor in charge of the guard force (the designated representative of the agency) will be responsible at all times for the proper functioning of the operation. And it is not a provision of the contract, that respondents will protect the plant and property of petitioner against all the world except Harry Frontczak, who was appointed by them to protect petitioner's property. Respondents could not sit in their offices in New York and perform this contract by a superintendent or manager issuing orders to his subordinates. He could not perform this contract.

As the Court said in *Craker* v. *Chicago and Northwestern Ry. Co.*, 36 Wis. 657 at page 674:

"They (the directors) could not perform this contract. Not surely in some distant office, by a superintendent or manager, issuing the orders of the directors to his subordinates. He could not perform this contract. *Quoad* this contract and this passen-

> ger, the corporation was present on this train to keep it and to care for her, represented by the officers of the train, who possessed, *pro hac vice,* the whole power and authority, and were the living embodiment of the ideal entity which made the contract, was bound to keep it, and is appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep, by its sole present representative appointed to keep it on its behalf."

Respondents have not contended that had they been personally present and had themselves wilfully and maliciously fired the premises of petitioner that they would not have breached their contract or that they would not be personally liable. They contracted as well, against the wilful and malicious acts of Harry Frontczak as they might against their own wilful and malicious acts. It is immaterial that they never authorized Frontczak to set the fires.

V.

Respondents, having obligated themselves, by their contract with petitioner, to provide protection for petitioner's plant and property and to be at all times responsible for the proper functioning of the operation, became responsible, notwithstanding the scope of his employment, for the harm caused by the wilful and malicious acts of their unfaithful servant.

Respondents, under a duty to provide protection for the plant and property of petitioner, when they confided the performance of the duties imposed by their written contract to the guards, who were their servants, became responsible to petitioner for the harm caused by the misconduct of the guards, notwithstanding the scope of the employment of the guards. The extent of their liability

of course, depends upon the duty which they assumed. See Restatement of Law of Agency, Vol. I, sec. 214, p. 471.

By the terms of their contract, they stipulated and agreed to furnish a uniformed armed guard service for the protection of the property of petitioner, to supervise the said guards, to carry out the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances and through their supervisor to be at all times responsible for the proper functioning of the operation. The testimony shows and the Court of Appeals found "there is no question but that Harry Frontczak, a guard, while on duty as such, wilfully and maliciously set three fires on the property of plaintiff" (Rec. 103 and 104).

From this time on, as from the beginning, we should keep constantly in mind two controlling facts—(1) that the relations of the petitioner and respondents were contract relations and (2) those between respondents and their guard, Harry Frontczak, were those of Master and Servant.

Another thing that should be kept constantly in mind is this. The general rule undoubtedly is, although subject to notable exceptions, that the master is not liable for the servants' malicious acts. The case here is one of those notable exceptions. And the contract relationships where it may occur—where we have these notable exceptions, are such relationships as the one at bar, the relationship of carrier and passenger and bailor and bailee, etc.

In *Stranahan Bros. Catering Co.* v. *Coit,* 55 Ohio St. 398, 45 N.E. 634, which was the milk case relied upon in the trial court (Rec. 76), Miller, the servant of Coit,

wilfully and maliciously adulterated the milk of his employer Coit and delivered it to the Stranahan Brothers. There the defense, as here, was that the malicious act of Miller was not within the scope of Miller's employment. The court reannouncing the rule heretofore announced that,

> "where the principal owes to third persons the performance of some duty, as to do or not to do a particular act, and he commits the performance of this duty to an agent, the principal cannot escape the responsibility civiliter if the agent fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice;"

with respect to the holding out by the Master of the servant, at page 638, said:

> "In every such case the principal holds out his agent as competent and fit to be trusted; and thereby in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

Continuing, at page 638, the Court further said:

> "Coming now, to the case at bar, were the acts of Miller, which caused the injury, in law the acts of his employer? That is, were they within the scope of his duties, or were they outside and beyond? And here we must not mistake the acts which caused the damage. At first blush it might seem that these acts were the watering of the milk, and those were not within any authority from the master. But not so. The putting of the water in the milk would have been quite innocuous, so far as plaintiff is concerned, had the compound not been delivered to the factory. It was the delivery there which produced the harm. In those acts of delivery Miller stood for and represented his master. Clearly, those deliveries were done in the course of his employment, in the execution of the service for which he was engaged by the master. Under such

conditions, why should the master not be liable? He had contracted to deliver pure milk, and, in trusting that duty to his servant, why had he not, applying the principle announced by Judge Story, held out that servant as fit to be trusted, and warranted his fidelity and good conduct in all matters connected with the performance of that contract? Why, in reason, should the loss occasioned by the rascality of the defendant's servant be thrown on the plaintiff? The latter had no voice in his selection; no control over his conduct. Does the servant's motive change the nature of the damages? Does it make the failure of the defendant to perform his contract any the less obvious, or any the less serious in results?"

Another notable case involving the contract principle and the liability of the master for the malicious acts of his servant where the Master has undertaken by contract to provide protection for the person or property of others and has entrusted the performance of such duty to his agent or servant is *Vannah* v. *Hart Private Hospital,* 228 Mass. 132, 117 N.E. 328. There the defendant operated a private hospital, for gain. Plaintiff was there to undergo an operation. She paid by the week for hospital services and also for the use of the operating room. When the plaintiff was etherized at the time of the operation, two of defendant's nurses were present at the operation. When plaintiff was etherized on the operating table, she had two rings on her hands. When the operation was completed and plaintiff was removed to her own room in the hospital the more valuable of the two rings which could not come off without assistance, was missing. The evidence tended to show that the ring had been forcibly removed from plaintiff's hand by the operating nurse, who, when last heard from, was in California. The defense there as here, was that when the nurse stole the ring she was

not acting within the scope of her employment. The Trial Court there held, as did the trial Court here, that the liability of the defendant depended upon whether or not the plaintiff had proved that the defendant was negligent. But the Massachusetts Supreme Court, at page 329 said:

> "If the plaintiff had stood in the relation of a stranger to the defendant, there would have been no error in the trial. But the plaintiff did not stand to the defendant in the relation of a stranger. It is apparent from the bill of exceptions that the case was not tried on the footing that the rights of the plaintiff in this action depended upon the contract made by her with the defendant. For this reason the terms of this contract do not appear as fully as they otherwise would have done. But from what does appear in the bill of exceptions the presiding judge was wrong in telling the jury that the defendant's liability depended upon the plaintiff proving that it was negligent.
>
> "Under the contract entered into by the defendant corporation, it was its duty not only (1) to give the plaintiff a room in the hospital before and after the operation and (2) to give her surgeon and family physician the use of the operating room for the operation, but also (3) to give to the plaintiff the services of such nurses as were necessary for her care before, after and during the operation. It expressly appeared at the trial that 'she (the plaintiff) paid to the hospital $15.00 a week for attendance.' The services of the nurses which under the contract the defendant was bound to furnish the plaintiff included the services of nurses while she was unconscious from the effects of the ether a condition which was a necessary part of the operation. And the question we have to decide is whether there was a violation of duty on the part of the defendant under this contract if the operating nurse in question stole the ring by forcibly pulling it off

the plaintiff's finger while she was under the effects of ether, or whether on the facts appearing at the trial, the jury could have so found. We are of opinion that the jury could have so found.

"If, for example, a stranger had burst into the operating room, attacked the plaintiff and done her bodily harm or had attacked the plaintiff while the nurses were carrying her from the operating room to her own room and defendant's nurses had stood by and done nothing to protect the plaintiff from these attacks, it is plain in our opinion that there would have been a violation of the duty owed by the defendant under its contract with the plaintiff. It is equally plain in our opinion that the duty owed by the defendant under its contract with the plaintiff extended to the care of the rings on her fingers while she was unconscious from the effects of ether as well as to the security of her person. And finally it is equally plain in our opinion that there is as much a violation of the duty owed by the defendant under the contract where the attack upon the person or larceny of the ring is committed by one of the defendant's own nurses (whose duty it was to protect the plaintiff) as well as in the case where the attack is made by the stranger and the nurses do not undertake to protect her from the attack."

The Court then cited the case of *Bryant* v. *Rich*, 106 Mass. 180, which arose out of a dispute between a passenger on one of the defendant's steamers and one of the defendant's waiters. The dispute resulted in an assault upon the plaintiff, and the plaintiff sued. The presiding judge ruled "There is no evidence that the steward and waiters, in assaulting the plaintiff, were acting within the scope of any authority, or in the discharge of any duty imposed upon them by the defendants," but in spite of this, the court instructed the jury that the plaintiff was entitled to recover. This ruling was sus-

tained on the ground as a matter of contract that plaintiff as a passenger had a right to receive proper treatment from the defendants and their servants and all of them. The Court in *Vannah* v. *Hart Private Hospital* in further discussing the decision in *Bryant* v. *Rich* held that said decision did not depend upon the fact that the defendants in the case were common carriers. The decision would have been the same had the assault and battery occurred on an excursion steamer in place of upon a steamer operated by a common carrier. And the decision would have been the same if the steward and the waiters had stolen rings from Bryant's fingers instead of knocking him down, as they did. Then at page 330 the Court said:

> "The doctrine of *Bryant* v. *Rich* applies whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort, the service of its, the defendant's employees. Where the injury to the plaintiff is caused by an act of defendant's servants done in the course of their employment, an action may be brought based on negligence of the defendant's servants for which the defendant is liable because the act took place in the course of his servant's employment or an action may be brought in that case based on violation of the duty owed by the defendant to the plaintiff under the contract between the defendant and the plaintiff."

And continuing, said the Court (page 330):

> "But where (as was the case in *Bryant* v. *Rich* and in the case at bar) the injury done the plaintiff is caused by an act of the defendant's servants outside of the servants' duty as employees of the defendant, but by an act of the defendant's servants, which while not in the course of the servant's employment, is none the less a violation of the duty by the defendant under the defendant's contract with

> the plaintiff, the only action that can be brought is an action founded upon the duty arising out of the contract."

Two cases in this court which involve injury done by servants of carriers to passengers which occurred outside of the scope of the employment, in one of which the carrier was held liable and the other the carrier was held not liable but which are apposite in that they tend to support the theory that has been constantly the theory of the petitioner in this case (the contentions of court and opposing counsel to the contrary notwithstanding), that respondents are liable for the wilful and malicious acts of their servant, Harry Frontczak, committed while he was engaged in executing respondent's contract, in setting three fires in the plant and property of the petitioner. One of these cases is *Steamboat Co.* v. *Brockett* 121 U. S. 637, 641, which is apposite on every issue in this case, and the other is *N. O. & N. E. Railroad Co.* v. *Jopes,* 142 U.S. 18, 27, in which this Court reversed a judgment in favor of plaintiff on the ground that the conductor who shot a passenger was acting in self defense. This last case distinguishes *Craker* v. *C. & N. W. Ry. Co.* 36 Wis. 657, which we have cited and other cases and emphasizes the applicability of the cases which we have cited to the facts in this case as set out in the statement of the case.

In *Steamboat Co.* v. *Brockett* 121 U.S. 637, an action was brought to recover damages sustained by the plaintiff below in consequence of injuries inflicted upon him by the employees of the defendant, a carrier of freight and passengers between the cities of Albany and New York in the State of New York. The plaintiff, who had become a passenger on the steamboat, Dean Richmond, of the defendant Company, at Albany, averred that in

consideration of having paid his fare, it undertook to carry him safely to New York, and thereby became bound that its servants and employees on said boat would not needlessly injure him while engaged in the discharge of their duties; that the defendant did not keep its contract, but broke the same, in that its servants on said boat needlessly and severely wounded him in his person during the voyage to New York, etc. It was claimed that the plaintiff had been received as a deck passenger and that plaintiff was "abaft the shaft" where deck passengers were not allowed, when injured; no duty, it was insisted, arose as to him under the contract of transportation, as to any other place.

The court held that it would not follow that this violation of the stipulation would deprive him of the benefit of his contract. Such violation gave the carrier the right to compel him to conform to its regulations. If plaintiff's injuries necessarily arose from his violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were not the necessary result of his being at the time, on the part of the boat where he had no right to be and were directly caused by the improper conduct of the carrier's servants while acting within the scope of their general employment or when in the discharge of special duties imposed upon them, he was not precluded from claiming the benefit of the contract for safe transportation and then, at page 645, the court said:

> "The plaintiff was entitled, in virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity to be imputed to the corporation, which constituted them agents for

the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, if, as was adjudged in *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 486, it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See also *Philadelphia, Wilmington & Baltimore Railroad* v. *Quigley*, 21 How. 202, 210. This rule, the Court of Appeals of New York well says, 'is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed.' *Higgins* v. *Watervliet Turnpike Co.*, 46 N.Y. 23, 27. The principle is peculiarly applicable as between carriers and passengers; for, as held by the same court in *Stewart* v. *Brooklyn & Crosstown Railroad*, 90 N.Y. 588, 591, 'a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.''

The Court discussed at length an instruction given by the trial Court to the jury and affirmed a judgment in favor of the plaintiff.

In *N. O. and N. E. R.R. Co.* v. *Jopes*, 142 U.S. 18, the plaintiff, who was shot by the conductor, obtained a verdict for $9,500.00. The defense there was self defense in that the plaintiff approached the conductor with an open knife in hand and in a threatening manner, and that the conductor, fearing danger, shot and wounded the plaintiff in order to protect himself.

The court reviewed *Steamboat Co.* v. *Brockett,* 121 U.S. 637 just cited, and noticed, according to that decision, that the carrier engages (p. 25) absolutely against the misconduct or negligence of its own servants employed in executing the contract of transportation, holding, however, that as the shooting was done in the exercise of self defense, there was neither misconduct or negligence: that in such a case the passenger by his own misconduct has broken the contract of carriage, and he has no cause of action for injuries which would result to him in consequence thereof. The Court at page 26, cited 2 Woods Railway Law, 1199, where the author stated the rule,

> "so far as railroad companies and carriers of passengers are concerned, it may be said that they are not only bound to protect their passengers against injury and unlawful assault by third persons riding upon the same conveyance, so far as due care can secure that result, but they are bound absolutely to see to it that no unlawful assault or injury is inflicted upon them by their own servants,"

and, citing Taylor on Private Corporations, Sections 347 2d Ed. said:

> "While a carrier does not insure his passengers against every conceivable danger, he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful assault against him * * * Recent cases state this liability in the broadest and strongest language; and, without going beyond the actual decisions it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employees while they are engaged in transporting him, no matter how wilful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have

been done in the furtherance of the carrier's business." (Citing cases.)

At page 27, the Court further said:

> "But, owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable though the assault was wanton and wilful and outside the scope of the employment. Notable instances of this kind are the cases of the *Craker* v. *Chicago and North Western Railway* 36 Wis. 657, in which a conductor had forcible kissed a lady passenger. The company was held responsible for the unlawful assault; and *Goddard* v. *Grand Trunk Railway* 57 Main 202, in which when a brakeman had committed a gross and offensive assault upon an invalid passenger, the company was held liable in damages."

Then there is the case of *Chicago and Eastern Ill. R.R. Co.* v. *Flexman*, 103 Ill. 546, 550, 551, which the trial court here had before it, by written briefs on respondent's motion to dismiss and again on the oral argument on the motion for a directed verdict, it being referred to in the oral argument as "railroad cases" (Rec. 72, 76).

In the *Flexman* case, Flexman sued for damages for permanent injuries inflicted upon him while a passenger in appellant's car by a brakeman in the employ of the company. The plaintiff went to sleep and on awakening, missed his watch and supposed it had been stolen. He refused to leave the train until he had recovered his watch. A passenger who was assisting the plaintiff to find the watch inquired of the plaintiff whom he thought had his watch and he pointed at the brakeman; immediately after the remark was made, the brakeman struck the plaintiff in the face with a railroad lantern inflicting the injuries complained of. A judgment for the

plaintiff was affirmed. The Court cited *Goddard* v. *The Grand Trunk Railway Co.* 57 Main 202, *Bryant* v. *Rich* 106 Mass. 180, *Craker* v. *Chicago & Northwestern Railway Co.* 36 Wis. 657 heretofore cited and other cases and at page 551 said:

> "The appellant was a common carrier of passengers * * * The company was bound * * * to place the trains in the hands of skillful engineers and competent managers—the agents and servants were bound to be qualified and competent for their several employments. Again, the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow passengers who might be on the train and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So too, the contract which existed between Appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for the wrongful acts towards passengers while in charge of the train."

Another Illinois carrier case which is apposite, is *McMahon* v. *Chicago City Railroad Co.* 239 Ill. 334. There was an altercation between the plaintiff, a passenger, in the streetcar of the defendant and the defendant's conductor, which culminated in a scuffle between the plaintiff, her husband and the conductor. The plaintiff was knocked against the corner of a set and seriously injured.

In discussing the liability of the defendant for the conduct of its conductor, the court at page 338 said:

> "The carrier's obligation is to carry his passenger safely and properly and to treat him respectfully, and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatever source arising, * * * if this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary the passenger is assaulted and insulted, then for the negligence or the wilful misconduct of defendant's servant, the carrier is necessarily responsible."

To the same effect is *Dwinelle* v. *N.Y.C. & H.R.R. Co.* 120 N.Y. 117, 125 where the Court held that the carrier undertakes absolutely to protect his passengers against the misconduct of its own servants engaged in executing the contract.

The Court of Appeals here in its opinion (Rec. 106) said:

> *"Plaintiff's breach of contract theory is far fetched. It goes to the extent that defendants by the contract were given complete custody and control of plaintiff's plant and likens the contract to one of bailment."*

The Court of Appeals would hold that petitioner in citing these cases was shifting its position and the theory of its cause to one of bailment when nothing of the kind was intended. These bailment cases involve the construction of contracts where the duty of care and protection is of the same nature and quality as that involved in respondents' contract with petitioner and on the construction of contracts of this nature are in point. As the courts in the several cases we have cited have said, in connection with the contract relationships there shown, the principal is liable for the negligent

acts of its own servants and undertakes absolutely to protect the person or property agreed to be protected by the terms of his contract from the misconduct of its own servants "engaged in executing the contract": Is the bailee relationship, where the property of the bailor is entrusted to the bailee for safe keeping any different? In *Vannah* v. *Hart Private Hosp.*, 228 Mass. 132, 117 N.E. 328, the Massachusetts Court expressed it in these words: "The doctrine of *Bryant* v. *Rich*, 106 Mass. 180 applies whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort, the services of it's, the defendants' employees". That is broad enough to *take* in the bailor-bailee relationship and the factual situation here.

Respondents did not stand to the petitioner in the relation of strangers. The relations between the petitioner and respondents were contract relations and those between respondents and their guard, Harry Frontczak, were those of master and servant. The malicious acts of Frontczak occurred while he was engaged in executing respondents' contract with petitioner. And when we come to the bailment cases and their applicability here, we should not lose sight of that fact. And not overlooking the criticism of the Court of Appeals we again direct the court's attention to the bailment cases and the criticism of the Court of Appeals, and note that at the time that respondents' servant, Harry Frontczak, wilfully and maliciously set the fires in the plant and property of petitioner, that the only guard inside of the premises was Harry Frontczak (Rec. 49) and he was entrusted by respondents with the execution of their contract with petitioner. The only other person in the premises was petitioners' maintenance man, George J. Staszak (Rec.

26). And George J. Staszak is not in any way implicated in the setting of the fires.

In Illinois, we have *Evans* v. *Williams,* 232 Ill. App. 439, in which the defendants operated a garage in which the plaintiff stored his automobile, paying the defendants $10.00 a month to care for and keep same. An employee of the defendants took the car out of the garage for a joy ride with a friend, and wrecked it by running into a freight train. The defendants there argued, as the defendants here do, that when the employee took the car and went on a lark of his own he was not acting within the scope of his employment. The action was an action by the bailor against the bailee. In discussing the relationship of the parties the Court held that in bailment the contract is in its nature a direct and personal obligation by which the bailee undertakes personally to keep safely the property committed to his care. It is an obligation from which he cannot relieve himself without the other's consent and the court, at page 443 of the opinion, said:

> "The actual work of guarding the property may be delegated to an employee, and in the customary way of conducting many businesses this must be done during certain hours of the day but the bailee is not hereby relieved from the personal obligation of his contract. An employee to whom such duty is delegated stands in the place of his employer and any negligence of this employee in protecting the property is the negligence of the employer, who can be made to respond in damages caused thereby. Any other rule would have a tendency to tempt a bailee to lessen his personal liability for damages by delegating to irresponsible servants the care of the property. This would be unjust to the bailor as increasing the risk to the property and decreasing his chances of obtaining adequate compensation for

damages thereto. The primary and essential object of this contract of bailment was the safety of the automobile, and no rule of law should tend to diminish this by putting a premium on lack of personal attention.

"The rule is aptly stated in Wood on Master and Servant, Sec. 321, p. 644.

"'When by contract, or by statute, the master is bound to do certain things, if he intrusts the performance of that duty to another, he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act; while, when the action sounds entirely in tort, lack of authority on the part of the servants avoids liability.'

"We hold that defendants in this case are liable to the plaintiff for the wrongful act of their employee, Powers, resulting in damages to the car".

When respondents undertook the care and protection of the plant and property of petitioner, pursuant to terms of contract dated February 27, 1943, Plaintiff's Exhibit 1, (Rec. 50, 82), and entrusted their servants—Harry Frontczak and the others—with the execution of their contract the burden which respondents assumed with respect to the conduct of their servants—Harry Frontczak and the others—as we have shown, made them responsible at all hazards for the conduct of their servants engaged in executing their contract precisely the same as though they themselves had performed it. It is apparent that respondents undertook absolutely to protect petitioner against the misconduct of their own servants engaged in the execution of their contract. The burden which respondents undertook under their contract is exactly equivalent to the burden assumed by the bailee in

Evans v. *Williams,* 232 Ill. App. 439 and the other bailment cases hereafter cited.

In *National Liberty Ins. Co.* v. *Stutevant-Jones Co.* 126 Ohio State 299, 156 N. E. 446, 52 A.L.R. 705, Lou M. Burlingame was the owner of an automobile which had been stolen from him and recovered near Findley, Ohio. Burlingame employed the defendant to make such repairs upon the automobile as might be necessary to enable it to be driven upon its own power to the service station of the defendant at Toledo and to there deliver it to Burlingame. The defendant sent one of its employees to bring back the car. He made necessary repairs upon it and then went upon a pleasure ride with a party of friends and while on this excursion, the automobile backfired, caught fire, and was destroyed. The insurance company paid Burlingame on its policy for the loss and took an assignment of his chose in action against the defendant and sued.

In *Pratt* v. *Martin,* 35 S.W. 2d, 1004 (Sup. Ct. Ark.) the defendant entered into a contract with the agent of the plaintiff under and by the terms of which the defendant undertook and agreed to take charge of the plaintiff's Buick Sedan and store it in the defendant's garage in the City of Fort Smith. Defendant sent an employee to pick up the car and instead of driving directly to the garage, the employee went upon an errand of his own. On the way back to the garage, there was a collision between the plaintiff's car and another car and plaintiff's car was damaged. The plaintiff did not know that his car was being driven anywhere except to the garage and the defendant did not know his employee was driving the car elsewhere until after the collision. The plaintiff based his right to recover on the contract of bailment with the defendant, for the storage of the car,

a violation of his contract, and damages to the car. The court considered the liability of the master for the negligence of the servant, saying: "It is well settled that the master is liable for negligent acts of the servant only when the acts complained of are within the scope of the employment", then considered also the lack of harmony as to whether the master's responsibility is determined by the scope of the servant's authority or by the course of his employment, saying that some courts hold that the bailee is not liable for the negligence of the servant unless the act is within the scope of his employment. Other courts hold that in an action for the breach of a contract of bailment the injured party may recover, notwithstanding the damages done by the servant, the same as if the act had been done by the bailee himself. Then the Court, at page 1005, said:

> "This suit, however, is based on an alleged breach of contract of bailment, and we think the better rule is that the possession of property, held by one as bailee, when confided to the servant of the bailee, so continues for the purpose of the master's contractual obligation to a third person until the bailee had performed his contractual obligation, and that an act done by the servant which results in the injury to the property of the third person, in the possession of the servant, by the authority of the master, is the act of the master, for which the master is responsible upon contractural obligation to such third person notwithstanding the fact that the particular action causing the injury was done in violation of the master's instructions.
>
> "When the bailee contracts to take charge of and care for the property and the property is damaged while in his possession, the liability of the bailee arises out of the contract. The master himself cannot by any act or conduct of his own release himself from the contract or its obligations, and he cannot

accomplish by a servant that which he cannot accomplish in his own person. The liability of the master grows out of the fact that the master has failed to do the thing he agreed to do, and, if one enters into a contract to do a certain thing, such as receive property as a bailee for hire, he cannot by either his own conduct or the conduct of a servant release himself from liability. The act of the servant is the act of the master.

"In an action for tort or negligence, the theory is that the thing done is done in obedience to the master's will and an act done by a servant in order to render the master liable must be done while the servant is about the master's business.

"In a breach of contract for bailment, the bailee is liable if he does not do the thing agreed to be done, and it makes no difference whether the failure to perform the contract is brought about by the act of the master or his servant."

And then the Court, at page 1005, cited and quoted from the case of *National Liberty Insurance Co. of America* v. *Sturtevant-Jones Co.*, 116 Ohio State 299, 156 N.E. 446, 448, 52, A.L.R. 705 as follows:

"Possession by the servant became *ipso facto* the possession of the master. When did the possession pass from the master? Can it be said that it rests in the breast of the servant to release his master from contractual liability to a stranger to the servant by himself becoming unfaithful to his master? If so, the contract of bailment affords the bailor scant protection.

"If the master be not responsible for the act of his servant, the bailor, for his own security, before entering into such contract, must not only investigate and determine the trustworthiness and the financial responsibility of the bailee, but must do the same with reference to each of his servants. The doctrine of *respondeat superior* makes the master responsi-

ble for the tort of his servant, done in the performance of the master's business; and an agent may bind his principal to a third person, within the scope of his authority. But neither a servant nor an agent is imbued with power to absolve his master or principal from his contractual obligation to a third person by an act which, if done by the master or principal, would not have absolved him. * * * The reason that the same theories do not apply to the liability of the master for a breach of his servant of a contractual obligation of the master to a third person does not arise out of the relationship of master and servant, but arises out of the master's contract, from which he cannot by any conduct of his own alone release himself. He cannot accomplish by his servant that which he cannot accomplish in his own proper person. *National Liberty Ins. Co. of America* v. *Sturtevant-Jones Co.*, 116 Ohio St. 299 156 N.E. 446, 52 A.L.R. 705; *South Garage Co.* v. *Brown*, 187 Ala. 484, 65 So. 400; *Corbett & Smeraldo*, 91 N. J. Law 29, 102 A. 889; *Employers' Fire Ins. Co.* v. *Consolidated Garage & Sales Co.*, 85 Ind. App. 674, 155 N.E. 533; *Maynard* v. *James*, 109 Conn. 365, 146 A. 614, 615, 65 A.L.R. 427."

"In the instant case the appellant contracted as bailee to safely keep the car of appellee, and he cannot either by his own wrongful act or the wrongful act of his servant release himself from the obligation of this contract. *Bradley* v. *Cunningham*, 61 Conn. 485, 23 A. 932, 15 L.R.A. 679; *Employers Fire Ins. Co.* v. *Consolidated Garage & Sales Co.*, 85 Inc. App. 674, 155 N.E. 533."

The Arkansas Supreme Court followed the Ohio Supreme Court and the Ohio Supreme Court followed the Illinois Appellate Court. And all three decisions are in accord with the decision of the Ohio Supreme Court in *Stranahan Bros. Catering Co.* v. *Coit*, 55 Ohio St. 398,

45 N.E. 634, 637, 63 and the decision of Massachusetts Supreme Court in *Vannah* v. *Hart Private Hospital,* 228 Mass. 132, 117, N.E. 328, 330 and the carrier cases heretofore cited. When the master by contract is bound to do a certain thing, if he entrust the performance of that duty to another, he becomes as the cases say, absolutely responsible for the manner in which the duty is performed precisely as though he himself had performed it. If this is good law when applied to a bailment, should the duty of care and protection be any less when the master undertakes the care and protection of one's plant or building and confides the performance of such duty to a servant? Should not the master, when he confides the care and protection of one's plant or building to a servant, be in like manner absolutely responsible for the manner in which his duty is performed?

These cases are clearly adequate authority to hold respondents, under their contract with the petitioner, responsible for all harm and damages which came to the petitioner as a result of the fires maliciously set in the premises of petitioner by respondents' uniformed armed guard, Harry Frontczak, entrusted with and then engaged in the execution of respondents' contract with petitioner.

Inasmuch as respondents may not by any act of their own release themselves from the contract, the obligations of which were assumed by them, they may not by entrusting the execution of their contract to their unfaithful servant, Harry Frontczak, accomplish that which they cannot accomplish by their own proper persons.

VI.

Respondents were independent contractors. Harry Frontczak was their employee and servant. Except as it might suggest replacement of guards, who did not fulfill requirements of service, petitioner neither had, retained nor exercised any control over Harry Frontczak nor any other guard provided by respondents. There was no divided control.

The United States Court of Appeals, by the prevailing opinion (Rec. 106), has found:

> "Plaintiff's breach of contract theory is far fetched. It goes to the extent that the defendants by the contract were given complete custody and control of plaintiff's plant and likens the contract to one of bailment. The premise upon which this argument proceeds is, in our judgment, unsound. It must be remembered that by the terms of the contract 'Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives. • • • the supervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company. • • • It is further agreed that the wishes of said Apex Smelting Company will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the services as outlined.' As stated by the court below, 'Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly.' Thus, not only did the plaintiff under the terms of the contract retain possession and control of its prem-

ises but it retained a large measure of control over the guards furnished by the defendants, including Frontczak."

In this, the United States Court of Appeals is in grievous error. The prevailing opinion of the Court is contradictory of many decisions not only of this court, but of many decisions of United States Courts of Appeal of other circuits and of the courts of last resort of Illinois and other states.

By the written agreement (Rec. 3, 50, 82) respondents agreed to furnish armed guards, five or more, for the protection of petitioner's property; such guards are to be guided by a set of general rules and written instructions issued by petitioner through its designated representatives. The supervision of the guards will be the responsibility of the designated representative of the Agency (respondents), who in turn will be responsible to and receive instructions from designated representatives of petitioner (Rec. 3, 82).

All uniformed representatives of the Agency (respondents) will carry out the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances. The supervisor of respondents in charge of the guard force to be at all times responsible for the proper functioning of the operation (Rec. 3, 4, 50, 82, 83).

It is further agreed the wishes of said petitioner will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the services outlined (Rec. 4, 50, 82, 83).

On the basis of the foregoing provisions of the contract the Court of Appeals by its prevailing opinion, found

"Thus, not only did the plaintiff, under the terms of the contract. retain possession and control of the premises, but it retained a large measure of control over the guards furnished by the defendants, including Frontczak."

The prevailing opinion concedes that the employment is that of respondents. If the respondents employed the guards, particularly the guard, Harry Frontczak, then in that event, the petitioner did not employ the guards and since the contract provided that respondents will furnish the guards that provision of the contract makes the guards the servants of respondents. The contract is between the petitioner and the respondents—it is not made by the petitioner with the guards. The contract is that the respondents will be guided by a set of general rules and written instructions to be issued by the petitioner. The rules, of course, are for the guidance of respondents in the performance of the duties entrusted to them by the terms of their contract. Petitioner will issue the rules and written instructions and when issued, to whom would the petitioner give these general rules and written instructions? Petitioner contracted with respondents and them alone, and not with the servants of respondents. And upon the making of this set of general rules and written instructions, they would go to respondents. For their servants to so ask would be highly improbable, if not grossly presumptious and impertinent on their part. We can be assured that the set of general rules and written instructions found repository with respondents.

Having received the general rules and written instructions to whom to promulgate them was the vexed problem of respondents, but to promulgate was the duty of respondents; and they heed their duty and make promulgation to their various servants. The servants are told to

obey the rules. For if not, why promulgate? The contract is that the respondents will provide a supervisor of the servants who, as the servant of the respondents, will be responsible to the petitioner and through the supervisor of the servants, respondents will receive instructions from petitioner and carry out the function of guarding the plant and property of petitioner. What then is this divided control of the servants of respondents and particularly of the guard, Harry Frontczak, so emphasized by the trial court and the court of appeals, notwithstanding the contract and the duties assumed by respondents so clearly set forth under the contract, as we have attempted to show? It surely was the duty of respondents, engaged in the performance of their contract, to receive and abide by the rules and written instructions furnished by petitioner. What did they do? They were entrusted with this duty of protecting the plant and property of petitioner. They put their servant, Harry Frontczak, into petitioner's plant to perform the services called for by the terms of their contract and when Frontczak wilfully and maliciously set the fires he and they were engaged in the execution of the contract. When the fires were set by Frontczak who had the power to control and direct him in the performance of his duties? Surely not petitioner.

If respondents under the terms of the contract, had the power of control and direction of their guards, including Frontczak, then petitioner did not. As it is clear that respondents retained the power of control and direction of these guards, it follows that the Court of Appeals is in error in holding to the contrary and in holding that petitioner retained a large measure of control over the guards furnished by respondents, including Frontczak. Under the terms of the contract, supervision of the guards

was the responsibility of respondents' supervisor in charge of the guard force and he was to be at all times responsible for the proper functioning of the operation.

A leading case in point is *Standard Oil Company* v. *Anderson*, 212 U. S. 215. In this case, the plaintiff Anderson, brought a suit in the Circuit Court of the United States, for the Eastern District of New York to recover damages for personal injuries alleged to have been suffered by him through the negligence of a servant of the Standard Oil Company. The plaintiff was employed as a longshoreman by one Torence, a master stevedore, who, under contract with defendant, was engaged in loading a ship with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a load of cases containing oil which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant and the cases of oil were conveyed from the dock to the hatch by means of tackle guy ropes and hoisting ropes furnished and rigged by the stevedore. The work was done with great rapidity. The motive power was furnished by a steam winch and drum owned by the defendant and placed on its dock. The work of loading was done by employees of the Stevedore except that the winch was operated by a winchman in the general employ and pay of the defendant. The stevedore paid the defendant an agreed sum for the hoisting. The winch was placed where it was impossible to determine the proper time for hoisting and lowering cases of oil and the winchman necessarily depended upon signals from an employee of the stevedore stationed on the deck of the ship. The negligence consisted in lowering a draft of cases before the signal was received. The Court held that the winchman remained a servant of the defendant and affirmed a judgment against the defendant for negligence.

It was insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore; if the servant of the master stevedore, the defendant was not liable. The Court in discussing this question, at page 221 of the opinion said:

> "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control and mere suggestion as to details of the necessary cooperation, where the work furnished is part of a larger undertaking."

At page 225 the Court further said:

> "The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existance. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum and the winchman were its own. It did not furnish them but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control."

Continuing, at page 226, the court quoting from the opinion by Judge Holmes in *Driscoll* v. *Towle,* 181 Mass. 416, said:

> "But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant more than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books."

It is clear from the opinion just cited that respondents may not be relieved from liability for the wilful and malicious acts of their unfaithful servant, Harry Frontczak, on any theory of divided control. At the time that the fires were set it cannot be claimed that petitioner had or was exercising over Frontczak any control whatsoever.

The opinion in *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, is followed by *Harrell* v. *Atlas Portland Cement Co.* (CCA 8) 250 Fed. 83. Harrel sued the defendant cement company for damages that resulted from personal injury inflicted upon him by the negligence of the servants of the cement company, especially of its engineer who was operating its steam shovel. The Court directed a verdict for the defendant on the ground that the injury appeared to have been caused by negligence of his fellow servants; that the engineer and his crew were acting under the direction and control of the cement company and with its servants is conceded, but it was contended that the plaintiff was directed and controlled in his acts by the Hannibal Connecting Railway Company by whom he was employed and paid. But the court, page 85, said:

> "Whether he was the servant of the cement company or of the railway company is not determined by the fact that he was employed and paid and might be discharged by the railway company, but by the answer which the facts give to the question did the railway company or the cement company have the exclusive power to direct and control his acts in doing the work he was performing at the time of his injury".

The Court cited *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, and other cases and held that in the conduct of the work that the plaintiff was performing at the time of his injury, the cement company was exercising the exclusive power to control and direct how, when and where he should do his work, that he was its servant and a fellow servant of the engineer and the members of the latter's crew and affirmed the judgment.

In *Singer Mfg. Co.* v. *Rahn,* 132 U. S. 518, an action was brought by the plaintiff against defendant for personal injuries done to the plaintiff by carelessly driving

a horse and wagon against her when crossing a street in Minneapolis. The horse and wagon was operated by one Corbett, employed by the defendant under a salary and commission contract set out in part in the opinion. The court at page 523 said:

> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished or, in other words, 'not only what shall be done, but how it shall be done' ".

The Court held the Singer Mfg. Co. liable—that under the circumstances, Corbett was defendants' servant for whose negligence defendant was responsible. Can there be any doubt here but what respondents with respect to Harry Frontczak, had the right to direct and did direct the manner in which the business was to be done—not only what he should do, but how he should do it. The agreement provided that the wishes of petitioner would be honored at all times consistent with good judgment in replacing representatives who in their opinion, do not fill the requirements of the service as outlined, but at the time that Harry Frontczak set the fires, he was under the control of respondents.

Another apposite case is *George A. Fuller Co.* v. *McCloskey,* 228 U. S. 194. McCloskey sued the Fuller Company for personal injuries caused by alleged negligence in the operation of an elevator in a building being erected by the Fuller Co. At the time of the accident, McCloskey was engaged in painting the elevator shaft and for that purpose, was riding on top of the elevator. The suit was against the Fuller Company and Otis Elevator Co. A verdict was directed in favor of the Otis Elevator Company but the case against the Fuller Company was sub-

mitted to the jury who found against the Fuller Company and the judgment was affirmed. The building was in the course of erection and the defendant entered into an arrangement whereby it became entitled to use the elevator in the prosecution of its work for which it paid $3.00 a day which was to cover the wages of the operator. The defendant entered into a contract with Robert E. MacKay Co. for the painting required by its contract with one Hibbs. Plaintiff was an employee of the MacKay Company. The elevator shaft was included in the contract. The Court at page 202 said:

> "It must be concluded that the operating of the elevator under this arrangement with the MacKay Company was an operating of it by the Fuller Company. It is true that the employees of the MacKay Company were to give the signals for starting and stopping the elevator, but this did not make the operator who received them the servant of the MacKay Company. These signals simply notified him as to what was required from time to time in the course of the service which the Fuller Company had agreed to provide".

The Court cited *Standard Oil Co.* v. *Anderson,* 212 U. S. 215 where the court had said:

> "The giving of the signals under the circumstances of this case was not the giving of orders, but information, and the obedience to those signals showed cooperation rather than subordination, and it is not enough to show that there has been a change of masters."

Labbee v. *Travenot S. S. Co.* (CCA 2) 37 Fed. 2d 52, involves the conduct of a negligent winchman. The opinion is by Judge Mack. The plaintiff was a longshoreman in the employ of a paper company working at the unloading of freight from a vessel, when he was injured. The Court,

page 54, held that it was not called upon to determine whether, as between the paper company that actually supplied the men, including this winchman, to perform its duty of unloading, and the ship owner who furnished some of the winchmen and who through the captain remained in general control of the ship and those working thereon, this watchman was doing the work of the former or of the latter.

> "It suffices," the Court said, "to absolve this defendant from liability, that, regardless of its obligation to have the necessary winchman supplied and its authorization to the paper company to replace at defendant's expense, any men not so furnished, defendant had nothing whatsoever to do with the actual work of unloading; that it would not and did not exercise any direction or control over any of the workmen. It follows, therefore, that irrespective of whether the negligent winchman could for any purpose be deemed to be in the general employ of the defendant, manifestly at the time and on that occasion, he was not doing any work that defendant had bound itself personally and through it own employees to do or that the defendant was in fact directing or controlling. In other words, he was not *pro hac vice*, defendant's servant, but either the ship owner or the paper company's."

Another case, holding that the test for determining liability for the negligent act of a servant is the right or power of person charged, to control the servant in performance of the act causing the injury, is *Phelps* v. *Boone, et al.* (CCA DC) 67 Fed. 2d 575. This was an action for personal injury against the defendant, a captain in the medical corps of the United States Navy at the time of the accident, and assigned as a physician to the White House, and another. In connection with his duties, the Navy Department had provided defendant for his use a

Packard automobile and a chauffeur named Prettyman. On the evening of April 19, 1932, Dr. Boone had his Packard car driven by Prettyman sent to the White House. He then went to his home for Mrs. Boone, from there to the home of General Patterson, and from there Prettyman drove the three of them to the home of a physician in Baltimore where they had dinner and after dinner went in his friend's car to the opera and was followed by Prettyman with the Packard. After the opera, they started for Washington in the Packard driven by Prettyman. On the return trip, around midnight, the driver of the car negligently struck and injured the car belonging to plaintiff. At the time of the collision, the defendant was sitting in the front seat with the driver. The negligence of the driver was not disputed. The sole question was whether in the circumstances the doctrine of *respondeat superior* was applicable. The defendant insisted that because the car itself belonged to the United States, and the driver, an enlisted man, was assigned to that duty and answerable to the Navy Department rather than defendant, there was lacking that control and direction, "so far as the defendant is concerned, to make the doctrine apply."

The question to be first determined, the Court held, was whether or not the car was being used by the defendant in the discharge of an official function or was being used for a purely private purpose, and held that the car was being used for a private purpose; that its use for that purpose thereby created the relation of master and servant between the defendant and Prettyman, the driver of the car. "The latter became *pro hac vice* the servant of the former and thus for the time being, that is when the act complained of happened, the driver was under the control of the defendant and doing the things he was then directed to do. The court at page 575 said:

"The usual test in such circumstances, that is to say, the determination of liability for a negligent act on the part of a servant is the right or the power on the part of the person charged to command and control the servant in the performance of the causal act at the moment of performance. Under the conditions the employer or master is the person who at the moment has the power of control" (Citing *Standard Oil Co.* v. *Anderson,* 212 U.S. 215; *Harrell* v. *Cement Co.* (CCA 8) 250 Fed. 83, 86).

To the same effect *Texas Co.* v. *Brice* (CCA 6), 26 Fed. (2d) 164, 166, cert. dend. 228 U.S. 640.

Respondents' servant, Frontczak, was guilty of wilful and malicious conduct in setting the fires. At the time he and the other guards were engaged in the execution of respondents' contract with petitioner. Can there be any question but that respondents at the time the fires were set had the exclusive right and the power to direct and control Harry Frontczak in the performance of his duties? That respondents, with respect to Frontczak, regardless of the agreement between respondents and petitioner "that the wishes of said petitioner will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined" at the moment of setting the fires had the exclusive right to direct and control Harry Frontczak in the work he was employed to do and was then doing, and not petitioner.

Furthermore, respondents were independent contractors. This should be apparent without further citation of authorities. Respondents by their contract were to furnish an armed guard service of five or more armed guards. The supervision of the guards was to be their responsibility and the respondents, functioning through their supervisor in charge of the guard force, were to

carry out the function of guarding petitioner's plant and to be at all times responsible for the proper functioning of the operation.

In the case of *Ozark Minerals Co.* v. *Murphy*, 384 Ill. 94, where an action was brought by Murphy as Director of Labor of the State of Illinois for delinquent contributions which he found to be due and owing under the Unemployment Compensation Act with respect to persons found to be employed by the Mineral Company as prospectors, miners and drillers. The Circuit Court found those persons to be independent contractors and not employees of the mineral company. The court at page 99, said:

> "In determining whether a workman is an employee or an independent contractor, the principal consideration, under the general rule pertaining to employer and employee, is the right to control the manner of doing the work. Not the actual exercise of the right by interfering with the work, but the right to control constitutes the test. (*Amalgamated Roofing Co.* v. *Travelers Ins. Co.*, 300 Ill. 487). 'An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result.' (Jaggard on Torts, sec. 73) * * * The test most often resorted to, in determining whether one is an employee or an independent contractor, is to ascertain whether the one doing the work represents the master as to the result of the work only, or as to the means. If he represents the master only as to the result and himself selects the means, he must be regarded as an independent contractor. (*Pace* v. *Appanoose County*, 184 Iowa, 498, 168 N.W. 916). The mere fact that the owner may have an overseer or architect to see that the work complies with the contract or that the work is done to the owner's satisfaction, does not change the character of the contract, if it meets the test stated."

In *Foster* v. *City of Chicago*, 197 Ill. 264, an action was brought by the administrator of the estate of John Shay to recover damages under the statute for alleged negligence of the defendant causing the death of the intestate. The court instructed the jury to find the defendant not guilty. The deceased was killed while employed upon the construction of a sewer, being built under contract made by the defendant with one John Sheehy. Under the contract, Sheehy was to furnish all labor and material and do all work necessary to fully complete the sewer. The whole of the work was to be commenced and carried on under the immediate direction and superintendence of the Commissioner of Public Works of the City of Chicago, and to his entire satisfaction, approval and acceptance. The Court held that the direction "to his entire satisfaction, approval and acceptance," related to results. The requirement that the time and manner of doing the work must be satisfactory to the City's Commissioner of Public Works does not include the means employed and is limited by the provisions of the contract. Such direction and superintendance provided for did not relieve the contractor of responsibility nor permit the City to change or modify the terms of the written instrument. The method of using the planks and timbers as specified in the specification was left to the contractor. The contract did not include the direction, management and control by the City of every detail of the work. The contractor was to be guided by the contract, and the specifications constituted a part thereof.

He, (Sheehy) was not a mere servant and employee. He was an independent contractor, the city retaining such supervisory power as it might from time to time find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby. The contractor employed and paid his own laborers. The de-

ceased was his employee. The difference between an independent contractor and a mere servant is not determined solely by the retention of a certain kind or degree of supervision by the employer. It is to be determined by the contract as a whole—by its spirit and essence—and not by the phraseology of a single sentence or paragraph. The deceased was not an employee of the City but an employee of the independent contractor.

In *Harding* v. *St. Louis Stockyards,* 242 Ill. 444, an action on the case was brought against the St. Louis Stock Yards and Armour and Company to recover damages for personal injuries received by the plaintiff while in the employ of the latter in the yards of its packing plant at East St. Louis. The case was dismissed as to Armour and Company and the jury returned a verdict against St. Louis Stock Yards. The defendant, St. Louis Stock Yards Company, maintained stockyards and was engaged also in a general switching business, delivering loaded cars to and receiving empty cars from the various railroads and maintained yards for that purpose. It contended that while the switching crew were in its general employ, they were in the special employ of Armour and Company at the time of the accident. The court held that no absolute or arbitrary rule could be laid down by which it can be plainly seen in every case whether a person is the servant of the general or special master as these terms are used in the decisions. The facts of each case must be looked to in order to reach the proper conclusion. Citing *Foster* v. *City of Chicago,* 197 Ill. 264, at page 449, the Court said:

> "That the difference between an independent contractor and a mere servant is not determined by the retention of a certain kind or degree of supervision by the employer and not by the phraseology of a

single sentence of paragraph but from the contract as a whole. This court in *Hale* v. *Johnson*, 80 Ill. 185, held that one who contracts to do a certain piece of work either entirely in accord with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is being done, without being subject to the order of the latter, in respect to the details of the work, is clearly a contractor and not a servant. And a person injured by his negligence in the performance of the work cannot recover against the one who employed the contractor."

The Court then cited Shearman Redfield on Negligence (4th Ed. Sec. 160-162) where it was held he is the Master who has the choice, control and direction of the servants. * * * The control of the servants does not exist unless the hirer has the right to discharge them and hire others in their places. The doctrine of *respondeat superior* is applicable where the person sought to be charged has the right to control the action of the person committing the injury. In quoting the above doctrine with approval in *Pioneer Fireproof Construction Company* v. *Hanson*, 176 Ill. 100, 108, this court said:

> "It follows that the right to control the negligent servant is the test by which it is to be determined whether the relation of master and servant exists; and inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists."

The Court then cited and analyzed at some length *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, heretofore cited, also *Driscoll* v. *Towle*, 181 Mass. 416, cited in *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, and at page 453 held that the switching crew at the time of the accident were not the servants of Armour & Company and said:

> "The mere fact that the foreman of Armour & Co. gave a list of cars or stated to the foreman

> of the switching crew which car should be transferred from one track to the other or taken from the yards to railroads outside, or what cars should be brought in from outside railroads to the yards, does not, as a matter of law, make the switching crew the servants of Armour & Co. * * * This accident was caused by the misplacing of a switch, which was entirely within the scope of the work of the switching crew and not under the direction of the foreman of Armour & Company."

It is fully apparent from *Harding* v. *St. Louis Stock Yards* 242 Ill. 444, when considered in connection with the facts and evidence in this case, and respondents' undertaking to be at all times responsible "for the proper functioning of the operation," that petitioner did not have or retain at the time the wilful and malicious acts complained of were committed by Harry Frontczak any control whatsoever over this unfaithful servant. He was respondents' servant and the fact that petitioners might request his removal and respondents would honor such request does not make him the servant or employee of petitioner for any purpose.

In *Meredosia Levy District* v. *Industrial Com.* 285 Ill. 68, one Clarence Glen Renner received an award from the Illinois Industrial Commission on the theory that he was an employee of the Levy and Drainage District. The work being done was under the direction of the drainage commissioners and Andrew Dolan, one of the commissioners, was present to watch and inspect the work. The Court, page 71, held that,

> "The control and supervision exercised by Dolan had to do only with the results sought to be obtained by the drainage district and not with the method or manner in which Renner was to do the work."

Renner operated his own machinery and employed his own workmen and was an independent contractor and

not entitled to compensation under the Workmen's Compensation Act.

Again, in *Olympic Commissary Co.* v. *Industrial Com.* 371 Ill. 164, the Court, adhering to former opinions, at page 171 said:

> "The principal consideration which distinguishes an employee from an independent contractor is the right to control the manner of doing his work. The test of the relationship is the right to control • • • He contracts to do a specific piece of work, furnishing his own assistants, executing the work entirely according to his own ideas or in accordance with a certain plan previously given him by the person for whom the work is done. He discharges his duties under that contract without being subject to the order of the latter with respect to the details of the work."

Other cases to the same effect are *Rosenbaum Bros.* v. *Devine*, 271 Ill. 354, 358, 359; and *Hayes* v. *Chicago, Ottawa and Peoria Railway Co.* 203 Ill. App. 472, where the Illinois Appellate Court page 480, said:

> "Nor does the right to exercise a supervisory control over the character, quantity and quality of work change an independent contractor into a servant of the other party to the contract."

From the many cases that we have cited, both State and Federal, and particularly *Standard Oil Co.* v. *Anderson* 212 U. S. 215, which has been followed by this Court, the United States Courts of Appeal and the Supreme Court of Illinois, it is clear that the provision of respondents' contract with the petitioner, providing that the wishes of the petitioner will be honored at all times consistent with good judgment in replacing representatives who in petitioner's opinion do not fulfill the requirements of the service as outlined, did not give—and it was never

intended to give to petitioner or any representative of the petitioner the right to control or direct Harry Frontczak or any other guard or employee of ~~respondents~~ petitioner in the performance of his work.

Respondents' guards, under the contract, were not, and that includes Frontczak, directed partially by both respondents and petitioner to protect respondents' property properly. Whatever control ~~respondents~~ petitioner retained with respect to its premises, it did not have or retain "a large measure"—or any measure of control over the guards furnished by respondents, including Frontczak.

That the wishes of petitioner would be honored at all times consistent with good judgment in replacing representatives who in petitioner's opinion did not fulfill the requirements of this service did not make the guards petitioner's employees or make petitioner responsible for their supervision or conduct. Respondents assumed the social security, unemployment taxes and employer's Liability Insurance (Rec. 3, 83). The supervision of the guards was the responsibility of respondents—and respondents made themselves at all times responsible for the proper functioning of the operation, and so they were.

VII.

Petitioner made a prima facie case. It was error, therefore, for the court to grant respondents' motion for a directed verdict at the close of petitioner's case.

By the terms of the contract between respondents and petitioner respondents were under a duty to care for ~~and protect the plant and property of petitioner (Rec.~~ and protect the plant and property of petitioner (Rec. 3, 50, 83). Respondents, having assumed that duty, confided the performance of the duties imposed upon them by

the terms of their contract, to their guards, one of whom was Harry Frontczak.

Defendants, by their contract, as we have repeatedly pointed out, undertook the function of guarding the plant of petitioner in the manner best suited, depending upon the circumstances, and made the supervision of the guards their responsibility and made themselves, through their supervisor in charge of their guard force, responsible at all times for the proper functioning of the operation (Rec. 3, 4, 50, 82, 83).

The allegation of the complaint (Rec. 5) is that the fires were set by defendants' guard, Harry Frontczak, "while active in his duties, as a servant of the defendants in, upon and about the premises of plaintiff." The evidence shows that the respondents, entrusted the duties imposed upon them by the terms of their contract to their guards, in charge of a supervisor of the guards; that the guards on duty, including Frontczak, were engaged in performing the duties with which they were entrusted by the terms of the contract. They were engaged in the performance of their duties and with the execution of the contract; and while so engaged, their guard, Harry Frontczak, wilfully and maliciously set the fires which resulted in harm to petitioner's property.

In *Johnson* v. *Barber* 10 Ill. 25, the plaintiff brought suit against the defendant for firing a prairie. The defense was that fire was set by John Johnson, who was an agent of the defendant, Peter Johnson, and at the time the fire was set, John was not acting within the scope of his employment. At page 431 of the opinion, the Court said:

> "The plaintiff was only required to prove that the defendants set out the fire that caused the injury. It rested upon the defendants to show the excuse and justification, if it existed."

And the United States Court of Appeals, in accordance with the evidence (Rec. 103), found:

> "The testimony shows and there is no question but that Harry Frontczak, a guard while on duty as such, wilfully and maliciously set three fires on the property of the plaintiff."

Under the evidence and the finding of the court, it is clear that if there was any theory upon which petitioner could recover in the trial court, or any court, the petitioner made proof sufficient to warrant a recovery, *a prima facie* case. The misconduct alleged was not negligence but wilful and malicious conduct which is the antithesis of negligence.

Under the Federal Rules of Civil Procedure, it is provided: Rule 8 (b) "all pleadings shall be so construed as to do substantial justice."

Rule 15 (b) "when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Rule 54 (c) "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The contract sued on was made a part of petitioner's complaint and received in evidence (Rec. 3, 50, 82). Wilful and malicious conduct on the part of respondents' guard, Harry Frontczak, was alleged and proven. No neg-

ligence was alleged in the petitioner's complaint and wilful and malicious conduct as we have already pointed out in the Statement of The Case, page 13, is not negligence. Negligence and wilfulness are mutually exclusive terms which imply radically different mental states. "Negligence" conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge of danger and wilfulness enter is not negligence of any degree, but is wilful misconduct. And respondents, by their contract, were bound as far as practicable, to protect petitioner's property from violence committed by strangers and, as we have shown, they undertook absolutely to protect petitioner's premises against the misconduct of their own servants engaged in executing the contract. The evidence showed breach of contract of which the trial court was required to take notice.

In *International Paper Co.* v. *General Fire Assur. Co.*, (C.C.A. 2), 263 Fed. 363 Justice Hough said: The Court cannot direct the jury, unless there is "no evidence before the jury—*whether it be weak or strong—which does so much as tend to prove the issue on the part of the side against which such direction is given.*"

Mr. Justice Kerner, who dissented here, pointed out in *Dixon* v. *The United States* (C.C.A. 7), 113 Fed. 2d 640, that such a motion is for the purpose of determining whether there is some evidence, competent and substantial, and in the consideration of such question, it is the duty of the court to take the view of the evidence and all the inferences that may properly be drawn therefrom most favorable to the plaintiff, and if therefrom, it is of such character that reasonable men in a fair and impartial exercise of their judgment, may reach different conclusions, then the case should be submitted to the jury.

As Mr. Justice Kerner, who dissented here, pointed out, in *Allen* v. *Pennsylvania R. R. Co.* (C.C.A. 7), 120 Fed. (2d) 63, 64, a question of law is thus presented which calls for a consideration of the record not for the purpose of weighing the evidence, since the jury is the constitutional tribunal provided for trying of facts in courts of law, but for the purpose of determining whether there was some evidence. In the consideration of such question, it is the duty of the court to take the view of the evidence and all the inferences that may be drawn therefrom, most favorable to the plaintiff, and, if the evidence is of such a character that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. See, to the same effect, *Fratta* v. *Grace Line* (C.C.A. 2), 139 Fed. (2d) 743, and *Shewmaker* v. *Capital Transit Co.* (C.C.A. D.C.), 143 Fed. (2d) 142, 143.

As this Court said in *Jacob* v. *New York City*, 315 U. S. 752, 756, the trial court should not "usurp the function of the jury" which is "a basic and fundamental feature of our system. • • • so fundamental and sacred to the citizen" and "should be guarded by the courts."

In point and worthy of further consideration here are *Stranahan Bros. Catering Co.* v. *Coit*, 55 Ohio State 398, 45 N.E. 634; *Vannah* v. *Hart Private Hosp.*, 228 Mass. 132, 117 N.E. 328, 329, 330; *Craker* v. *C. & N.W. Railway Co.*, 36 Wis. 657, 669, 670, 673, 675, previously cited.

When respondents were employed that the property and plant of petitioner might have care and protection and to relieve hazards that are found to exist and respondents assumed the duties imposed upon them by the terms of their contract, and they entrusted the performance of the duties imposed upon them by the terms of

their contract to guards employed and furnished by them and they agreed to be responsible at all times for the proper functioning of the operation, their contract was a guaranty on their behalf, as we have shown, that petitioner's plant and property would be protected absolutely from the misconduct of their own servants, malicious or otherwise, entrusted with and engaged in the execution of their contract with petitioner. It is no excuse or justification to say that their unfaithful servant was not acting within the scope of his employment. Respondents contract was to protect petitioner's plant against all the world; respondents did not reserve the right to their servant Harry Frontczak to set the fires and burn petitioner's plant.

Respondents did not undertake to insure petitioner's plant and property against every possible danger, but they did undertake absolutely to protect petitioner's plant and property against the wilful sabotage by their own servants engaged in the execution of their contract. That is the doctrine of *Stranahan Bros. Catering Co.* v. *Coit,* 55 Ohio State 398, 45 N. E. 634 and *C. & E. I. R. R. Co.* v. *Flexman,* 103 Ill. 546, 550, 551, 552 and *Bryant* v. *Rich,* 106 Mass., 180 and *Craker* v. *C. N. W. Ry. Co.,* 36 Wis. 657, cited in the *Flexman* case, relied upon in the trial court and since. And as this brief shows these cases were relied upon by petitioner from the beginning and are supported by respectable authority almost everywhere.

VIII.

Petitioner's theory of liability in the District Court, in the United States Court of Appeals, and here, is the same: that respondents under their contract with petitioner became responsible for the harm and injury caused by the wilful and malicious conduct of their servant, Harry Frontczak, notwithstanding the scope of his employment, and the United States Court of Appeals erred in holding that petitioner tried its case below on the negligence theory and lost and there is nothing that would justify a reversal of that decision to enable the petitioner to try its case on a different theory.

The United States Court of Appeals, by the prevailing opinion, is cognizant and apparently takes notice of the rule stated in the Restatement of Law of Agency, Volume 1, Section 214, pp. 471, 472, that where a master or other principal is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duties to a servant or other agent is subject to liability to such others for harm caused to them by the failure of such servant to perform his duty; and that under such circumstances, a principal or agent may become responsible for the harm caused by the misconduct of such agent or servant, notwithstanding the scope of his employment.

The Court of Appeals, by the prevailing opinion, seems to recognize that petitioner had such a case and that same was *prima facie* proven by the evidence on the trial of the case.

The Court of Appeals, however, rejects the case made by the evidence and to which it was required to give consideration by the Federal Rules of Civil Procedure,

viz.: Rule 8 (f), which provides that "all pleadings shall be so construed as to do substantial justice;" Rule 15 (b) which provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."; and rule 54 (c) that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. Under the Federal Rules of Civil Procedure the baneful theory of pleadings as we have pointed out has been repudiated. Pleadings are to be liberally construed. Nevertheless the Court of Appeals seeks to justify its erroneous decision on two grounds:

1. That petitioner's contract theory is far fetched—(Rec. 108), which it is not.

2. That a reviewing court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court—which is not in accordance with the record in this case. The contract was pleaded, offered and received in evidence (Rec. 3, 50, 82) and the case tried on the footing that the rights of petitioner depended upon the contract.

By Point V of our brief, we have endeavored to apply the contract theory to the pleadings and the facts as they are shown by the evidence and to show that respondents by their contract, undertook to provide care and protection for the plant and property of petitioner, and, having confided the duties of care and protection imposed upon them by the terms of their contract, that they were bound, as far as practicable, to protect plaintiff's plant and property from violence committed by strangers and that they undertook absolutely to protect petitioner's plant and property against the misconduct

of their own servants, engaged in executing their contract, precisely the same as though they themselves had performed it and without reference to the question of whether its servant was authorized to do the particular act.

By point VI of our brief, we have demonstrated, we believe, by decisions of this Court, notably *Standard Oil Co.* v. *Anderson,* 212 U.S. 215 and other decisions of this Court and by cases from other United States Courts of Appeal and from the Supreme Court of Illinois, that the test of the Master and Servant relationship is the right to control and direct the servant in the work he was performing at the time of the occurrence, and that respondents at the time of the occurrences complained of, had the exclusive right to control their unfaithful servant, Harry Frontczak, in the performance of the work in which he was then engaged, including, as well, the right of discharge, and that that right was not in any way modified but on the contrary, confirmed by the provision of respondent's contract that the wishes of petitioner would be honored at all times consistent with good judgment in replacing representatives who in petitioner's opinion, did not fulfill the requirements of the service as outlined.

The theory of the respondents—upon which they have relied from the beginning, and still do, is that the acts complained of, suffered or committed by Harry Frontczak were not within the scope of said guard's employment nor was he acting within the scope of his employment nor were the acts authorized by the respondent or incident to said guard's employment.

That was a "negligence defense" and as a defense, it was sustained by the trial court but it was never the theory of petitioner, the trial court and the prevailing

opinion of the Court of Appeals to the contrary notwithstanding.

Respondents concede that no negligence is alleged in petitioner's complaint and in determining whether negligence was the theory of the petitioner in this case, the Court, for one thing, should keep constantly in mind, as we have pointed out, that petitioner did not stand in the relation of a stranger to respondents, that the relations of petitioner and respondents were contract relations and that between respondents and their guard Harry Frontczak, [redacted] were those of master and servant. Petitioner's right to recover depends upon the contract made by it with respondents.

As we pointed out at point II of this brief, with abundant citation of authorities, whether the action is one in contract or in tort is to be determined solely from the pleadings As the Court in *DeLoach* v. *Crowley's Inc.*, (C.C.A. 5), 128 Fed. 2d 378, heretofore cited, at page 380, said:

> "Under the rules of Civil Procedure, a case consists not in the pleadings but the evidence for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than on the pleadings * * *. Rule 8 (f) says that 'all pleadings shall be so considered as to do substantial justice' ".

The Court should also keep constantly in mind that the complaint in this case in which the contract involved is set out in *haec verba* (Rec. 3) is but a "simple statement in sequence of the events which had transpired, coupled with a direct claim by way of demand for judgment which the petitioner expected and hoped to recover; and that is the measure of clarity and safety called for by the Federal Rules of Civil Procedure. *Gins* v. *Mauser Plumbing Supply Co.*, (C.C.A. 2), 148 Fed. 2d 974, 976.

By paragraph 4 of its complaint (Rec. 5) petitioner alleged: "That on or about the 5th day of September, 1946, of these uniformed armed guards so placed by respondents in the care and protection of petitioner's premises, one, Harry Frontczak, on or about the 8th day of September, 1946, while active in his duties, as the servant of defendants, in, upon and about the premises of petitioner, did, wilfully and with intent to wreak vengeance upon petitioner, cause combustion to take place within the premises of petitioner and a conflagration to ensue thereon, to the harm and injury of said premises and to the contents therein." If the proof in that respect was insufficient, the Court of Appeals by the prevailing opinion could not have found (Rec. 103, 104) that "The testimony shows and there is no question but that Harry Frontczak, a guard, while on duty as such, willfuly and maliciously set three fires on the property of plaintiff". With the allegations of the complaint as they are and the proof in support thereof undisputed, there is not much comfort that the respondents can take by stating in their answer that the complaint does not charge any act of negligence or that it does not charge any breach of contract on the part of respondents or any of them. It cannot be disputed that the complaint does allege wilful and malicious conduct on the part of Harry Frontczak, the servant of respondents. This wilful and malicious conduct charged in this complaint is the antithesis of negligence. The evidence does show, we respectfully submit, that respondents assumed the duties imposed upon them by the terms of their contract and confided the performance of the duties assumed by them by the terms of the contract to their servants, one of whom was Harry Frontczak, and that Harry Frontczak, while engaged in the execution of petitioner's contract, maliciously set the three fires which resulted in harm

to petitioner's plant and property and that such conduct was wilful and malicious and a breach of petitioner's contract. As we have heretofore pointed out on respondents' motion to dismiss the complaint, petitioner's opening statement in its written brief was "that the claims here are of injuries and loss from the wanton and wilful acts of the servant of defendants, with resulting breach of contract on the part of defendants" and petitioner cited and quoted from *Stranahan Bros. Catering Co.* v. *Coit*, 55 Ohio State 398, 45 N.E. 634, and *C. and E. I. R. R. Co.* v. *Flexman*, 103 Ill. 546, 550 and 551 in which case were cited the cases of *Bryant* v. *Rich*, 106 Mass. 180, 8 Am. Rep. 331 and *Craker* v. *C. & N. W. Railway Co.*, 36 Wis. 657, 669, 670 and 673.

See also 3 Am. Juris, Sec. 253, p. 38 where the author says:

> "In order to determine the theory of a case as presented to the trial court, the appellate court will look to the entire record and the briefs of counsel and will construe the pleadings on the theory most apparent, most clearly outlined by the facts stated, and according to their *general scope and tenor.*"

By the *Stranahan Bros.* case the trial court had specifically called to its attention the rule that where a principal or master owes to a third person the performance of some duty as to do or not to do a particular act and commits the performance of the duty to a servant, the principal or master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful or whether it be the result of negligence or malice, nor is the case altered if it appear that malice was directed toward the master, and in *C. and E. I. R. R. Co.* v. *Flexman*, which cited *Bryant* v. *Rich*, 106 Mass. 180, where a passenger of a steam boat was assaulted and injured by the steward and some of the table

waiters and *Craker* v. *C. and N. W. Ry. Co.*, 36 Wis. 657, where the conductor of a railroad kissed a female passenger against her will.

In *C. & E. I. R. R. Co.* v. *Flexman*, 103 Ill. 546, the trial court had before it an opinion where the court held, page 551:

> "that a carrier (and the relationship between a carrier and a passenger is a contractual relation) was not an insurer against every possible injury that a passenger might receive while on a train, but that if the servants of the carrier in charge of the train should fail to use reasonable diligence to protect its passenger from injuries from strangers while on board the train, the company would be liable and that the contract which existed between the common carrier and the passenger was a guarantee on behalf of the carrier that the passenger would be protected against personal injury from the agents or servants of the carrier in charge of the train, and that the carrier, having placed its men in charge of the train, justice demanded that it should be held responsible for their wrongful acts toward passengers while in charge of the train."

The obligation of the seller in the adulterated milk case to deliver pure milk did not depend upon whether the unfaithful employee was acting within the scope of his employment; the obligation of the hospital in *Vannah* v. *Hart Private Hospital*, 228 Mass. 132, 117, N. E. 328, 330, did not depend upon whether the employee who stole the plaintiff's ring was acting within the scope of her employment; the obligation of the carriers in the *Craker* case, the *Flexman* case and other carrier cases, when their employees assaulted passengers did not depend on whether the employees were acting within the scope of their respective employments. The obligation of the bailees in the bailment cases did not turn upon or depend upon whether the defaulting or malicious employees who

destroyed or damaged the bailed property were acting within the scope of their respective employments.

As the court said in *Vannah* v. *Hart Private Hospital,* 228 Mass. 132, 117 N. E. 328, 330, heretofore cited, "the doctrine of *Bryant* v. *Rich,* 106 Mass. 180, applies whenever there is a contract between the plaintiff and defendant, by force of which the defendant is to furnish for the plaintiff's comfort, the service of its, the defendants' employees."

In none of the cases which we have cited, where the defendants were bound by contract to do or not to do a particular act or render a specified service, were the defendants, freed from the obligations imposed upon them by the terms of their respective contracts, on the ground that their unfaithful employees were not acting within the scope of their respective employments.

This case from the beginning was tried on the footing that the rights of the petitioner depended upon the contract made by the respondents with petitioner for the care and protection of petitioner's plant and property with duties as provided in the contract between them.

The duties of respondents with respect to the plant and property were expressly stipulated for. Petitioner's claims from the beginning were of loss and injury from the wilful and malicious acts of the servant of respondents, with resulting breach of contract on the part of respondents.

The only way that "negligence", which arises from a failure of purpose and was not involved in this case, got injected into it was by the effort of respondents to free themselves from liability for the wilful and malicious acts of their unfaithful employee, on the ground that their unfaithful servant was not acting within the scope of his authority. For negligence of which there was none al-

leged, respondents admit liability. For wilful and malicious conduct of their unfaithful servant, Harry Frontczak, which was fully proven and for which they are liable, they deny liability.

Respondents' position is that they are not liable for the malicious breach by their servant of the contract which they were appointed to perform for the petitioner. Like the Court said in *Craker* v. *C. and N. W. Ry. Co.*, 36 Wis. 657, if one hire out his dog to guard sheep against wolves, and the dog sleeps while the wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable, but the Wisconsin court refused to sanction so vicious an absurdity.

Respondents' contract with petitioner was to protect petitioner's property against all the world. Respondents construction is that it was to protect the petitioner against all the world except respondents' own servants, whom they selected to protect the plant and property of petitioner. Is there any reason in this case or any case, why the Court should sanction so vicious an absurdity?

Petitioner, therefore, prays that this Court issue its Writ of Certiorari herein and that the final judgment in the United States Court of Appeals for the Seventh Circuit rendered herein, be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 461

THE APEX SMELTING COMPANY,
Petitioner,

vs.

WILLIAM S. BURNS, RAYMOND J. BURNS AND WILLIAM J. BURNS, II, CO-PARTNERS, DOING BUSINESS AS THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

STATEMENT OF FACTS.

A brief statement of facts is deemed necessary to correct inaccuracy and omissions in Petitioner's statement.

The plaintiff relied entirely on the theory of negligence to impose liability for its alleged loss during the proceedings in the Trial Court, and the theory of the plaintiff was clearly stated in the opinion of that Court (Rec. 79, 80):

> "In passing upon the motion to direct and dismiss the action, which was filed shortly after this cause was removed here, the court denied that motion, after reviewing the authorities that were cited here today and certain others cited by both sides, without prejudice to the right of the defendants to renew an appropriate

motion based upon similar grounds at the end of the plaintiff's case.

"The complaint in this case contains no allegation whatsoever of a lack of due care or caution on the part of the defendant in retaining the services of this particular guard, as he is referred to in the plaintiff's complaint, and that fact, in view of the statements that were made in the brief at the time the motion to strike and dismiss was before me, I thought that possibly the proof on behalf of the plaintiff might contain some evidence of lack of due care on the part of the defendant in selecting this particular employee, and if such proof were elicited upon the trial, under our new rules of procedure, the plaintiff would be permitted to amend its complaint to conform with the proof, and it might then be a question.

"It is clear, upon review of the pleadings as it is in now and upon review of the plaintiff's evidence, and after listening to the witnesses as they testified, it is quite clear, both in that review and in the pleadings and in the evidence that this guard, Frontczak, was acting outside of the scope of his employment.

"Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly. He is directed to walk around the grounds to these various boxes he has to pull, eighteen of them, and I assume from the testimony, although it was not clearly stated, if he noticed anything wrong, he was there to put it right or report it.

"Here is a man whose sole duty is to guard the property, and he deliberately destroys the property. Certainly it cannot be said that was within the scope of his employment, to the extent that the employer is required, under the doctrine of respondeat superior to make good any damages for such deliberate disobedience to order. And that is what we have here. I do not find any conflict at all in the Illinois authorities which have been cited by both sides, on the facts. Many of them can be clearly distinguished from the facts in

this case, but the law is clear in Illinois, and where we have a complete departure from the line of the employment, a complete departure from the employer's orders, a complete departure from the scope of the employment, the employer is not responsible.

"Now, there is no evidence in this case of that, therefore, under the doctrine of respondeat superior, I can see no liability on the part of the defendant.

"Now, as I stated, I thought there might have been some proof introduced here that the defendants were negligent in selecting this employee. They may have been. Personally, I will say this, from looking at him, he does not impress me as being a very intelligent looking character.

"However, possibly the defendants had difficulty in this case, and hired practically anybody who was able to stand up. There was a shortage, and still is, in certain lines of endeavor.

"The defendants possibly, as their counsel urges, were entitled to rely on the fact that this man had held positions with the Government, and apparently had left them of his own volition.

"Whether or not it was their duty to find out that he was once in an institution for the insane, and discharged as cured, if he was cured, I don't know. The record has nothing on that. There is no evidence as to whether he was asked to fill out an application blank. There is no evidence that the plaintiff in this case made any effort to determine whether or not he was a fit person to put in charge of their property, which, under the contract with the defendant, they were entitled to do.

"In fact, the record is completely silent on the one point of negligence that, in my opinion, may have justified this case having gone to the jury and may have justified the jury in making a finding. That is the only point on which I failed to grant, and I deliberately refused to grant defendants' motion when it was made on the pleadings. I have now heard the evidence and the record is still silent on the point. The only point argued here is whether or not this man was within the scope of his employment. Certainly he was not. Since

the plaintiff rests his entire case on that, and on the doctrine of respondeat superior, I find no recourse but to grant defendants' motion. Accordingly the motion is granted and the jury will be instructed to return a verdict for the defendants, and the case is hereby dismissed at plaintiff's cost."

Petitioner contends that his contract theory was advanced in the Trial Court. In this, the Petitioner is confused. When the motion was made for a directed verdict at the close of the Plaintiff's case, and counsel for both sides had presented their respective arguments in support of their respective positions on the motion, the following colloquy took place between the Court and counsel for the Plaintiff (Rec. page 79):

"The Court: Do you care to make any other observations? I will hear them if you do.

Mr. Neale: Just briefly.

The Court: Yes, I will hear you.

Mr. Neale: Throughout the multitude of adjudications considering the law of master and servant are the phrases 'scope of employment,' 'scope and authority,' 'in furtherance of the master's business' or 'Within the relation of master and servant,' and in fact, there are a few cases in other jurisdictions, the intendance on these phrases in novel. Such are not the cases in Illinois and in many foreign jurisdictions. The courts are agreed on the import of law.

In this state, it is held that the intendments of these various phrases is to say that the master must answer for the deeds of his servant in whatsoever he may do, from whatsoever motive he may act, that the servant is doing the work of the master notwithstanding the act of the servant may be wanton, or wilful; that the master, with the right to direct and control his manner of doing it, he ought to answer to others for whatever injury is suffered by reason of what the servant does, or the manner he does it.

In conclusion, I think this is a jury question for this jury to decide."

We respectfully point out that at this closing point of the case in the trial court, counsel for Plaintiff did not suggest or intimate by a single word, argument or authority cited that they were seeking to recover from the Defendants for an alleged breach of contract.

The trial court, counsel for both sides and the Court of Appeals did not misapprehend or misconstrue the pleadings, evidence or arguments. The present line of reasoning is an afterthought; is far fetched and is not substantiated by the record.

The statement of the case in Petitioner's Brief is so vague and indefinite and presented in a distorted manner and at the risk of repetition, we take the liberty of presenting to the Court a concise, complete and connected statement of the proceedings as they were unfolded in the Trial Court.

A contract was entered into between the parties as follows (Rec. 82, 83, 84):

"AGREEMENT.

Chicago, Illinois
Date: 2/27/43

The following agreement is entered into by the William J. Burns International Detective Agency and the Apex Smelting Company, Chicago, Illinois.

The William J. Burns International Detective Agency agrees to furnish to the Apex Smelting Company a uniformed armed guard service consisting of five (5) armed guards, or more as may be agreed upon from time to time between the parties, for the protection of its property, make suggestions to relieve hazards that are found to exist, and at all times endeavor to improve the service.

Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives.

The said Agency agrees to furnish uniforms and equipment, including side-arms, belts, holsters and badges without cost to said Apex Smelting Company. Further, said Agency assumes the Social Security, Unemployment Taxes and Employer's Liability Insurance.

The supervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company.

All uniformed representatives of the Agency will carry out the function of guarding the plant of the Apex Smelting Company in the manner best suited, depending upon the circumstances. The guards will either be stationed at designated points or, if necessary, maintain a constant patrol. It is further understood that guard service will be furnished over such hours agreed upon by the parties hereto, but at no time is the total number of guard hours to be less than 280 hours per week.

It is further agreed that the wishes of said Apex Smelting Company will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined.

It is agreed that said Apex Smelting Company will give said Detective Agency sufficient time after acceptance of contract to arrange intelligently the force to be detailed and to properly outfit such representatives so that their appearance will reflect favorably upon both parties to the agreement.

It is also understood that the Apex Smelting Company will not hire for their employment for a period of at least one year after the discontinuance of this service any employee of said Detective Agency.

For this service the Apex Smelting Company is to pay to the William J. Burns International Detective Agency the sum of ninety cents (90¢) per hour per guard and $1.10 per hour for the guard supervisor.

The supervisor in charge of the guard force, to work

one eight-hour shift daily and be responsible at all times for the proper functioning of the operation. These hourly charges are to be made without regard to any overtime charges which must be paid by the Agency to its employees. The Agency will furnish the Apex Smelting Company with daily time sheets and invoice the Apex Smelting Company on the first of each month.

The above service will begin on Monday, February 15, 1943, at 6:00 A. M. and shall remain in force until the expiration of a thirty (30) days' written notice by either or both parties to the agreement whose signatures are appended below.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
By A. R. LAPITZ,
Manager.

THE APEX SMELTING COMPANY,
By F. N."

The defendants in pursuance of said agreement furnished to the plaintiff guards for use in guarding the plant. On September 8, 1946, one Harry Frontczak, a guard, wilfully and maliciously set three fires on the property of the plaintiffs (Rec. 37, 38). Thereafter, the said Harry Frontczak admitted setting the fires and was indicted and found guilty by the Criminal Court of Cook County, pursuant to a complaint filed by a representative of the Apex Smelting Company (Rec. 42, 43).

The evidence further showed that before the said guard was employed by the defendants he was employed by the Government of the United States in various capacities, that is, the Army Air Forces in the Stevens Hotel, for over a year, and left when that job terminated (Rec. 43), the Bureau of Internal Revenue, six months, and left when that job terminated (Rec. 39), the Post Office at Chicago for over two years until that job terminated (Rec. 32).

A complaint was filed in the Superior Court of Cook County, Illinois, and although all the defendants were non-residents of the State of Illinois and were residents and citizens of the State of New York and not served with process, they voluntarily appeared and removed the cause for trial to the United States District Court for the Northern District of Illinois (Rec. 7, 8, 9, 10, 11).

The complaint alleged that the plaintiff was the owner and in possession of certain premises commonly known as 2515-2561 West Taylor Street and 2554-2560 West Fillmore Street, situate and being in the City of Chicago, County of Cook and State of Illinois, and was in the exercise of due care and caution for the preservation of such premises from injury and harm, and within the same the plaintiff was active in the conduct and operation of a large and commodious plant in the manufacture of varied and numerous commodities; that its plant might have care and protection from sabotage and other interruption of efficient operation, and moved thereto in consideration thereof, the plaintiff and defendants, on the 2nd day of February, 1943, entered into a certain writing obligatory, in words and figures as follows (The writing referred to is set out hereinbefore in the statement of the case).

That on the 15th day of February, 1943, in strict accord with the terms and conditions thereof, the defendants entered upon the performance of said writing obligatory, and, that the plaintiff might have full care and protection of its plant and efficient operation of the same without interruption, the defendants furnished to the plaintiff an uniformed armed guard service of five armed guards, with a supervisor of the guard force in charge thereof and responsible at all times for the proper functioning of the guard service.

That on or about the 5th day of September, 1946, of these uniformed armed guards, so placed by the defend-

ants in the care and protection of the plaintiff's premises, as aforesaid, one Harry Frontczak, on or about the 8th day of September, 1946, while active in his duties, as the servant of the defendants, in, upon and about the premises of the plaintiff, and coincident therewith, from infirmity of temper, and under the influence of passion aroused by real or fancied grievance, did, wilfully and with intent to wreck vengeance upon the plaintiff, cause combustion to take place within the premises of the plaintiff and a conflagration to ensue thereon, to the harm and injury of said premises and to the contents therein.

That by the combustion caused to take place within the premises of the plaintiff, by the servant of the defendant, and the resulting conflagration thereon, as aforesaid, said premises and the contents thereof were in part consumed by fire; that by the quenching of the flames, said premises of the plaintiff and the contents thereof were harmed from smoke, soot, debris and water incident thereto; that by the restoration and repair of said premises, the plaintiff expended a large sum of money; that by the consequent interruption in the operation of its plant and other work stoppage, the plaintiff was injured by delayed production of its many and varied commodities; and by reason thereof, and of all and sundry, as aforesaid, the plaintiff has suffered great loss, and has sustained damages in the sum of twenty thousand dollars.

Wherefore, the plaintiff prays judgment against the defendants for the sum of Twenty Thousand Dollars, and for the costs of this action (Rec. 2, 3, 4, 5).

A motion was filed by the defendants to strike the complaint and dismiss the cause on the following grounds that:

The complaint does not charge any act of negligence against the defendants or any one of them;

The complaint does not charge any damage was suffered by the plaintiff through the negligence of, or as a direct and proximate result of any negligence on the part of these defendants or any one of them;

The complaint does not charge any breach of contract on the part of these defendants or any one of them;

The complaint does not charge any cause of action against these defendants or any one of them;

The complaint does not charge that the alleged damage sustained by the plaintiff was caused as a direct and proximate result of any negligence or breach of contract by any of the defendants' agents, servants or employees acting within the scope of such agent's, servant's or employee's authority or scope of employment;

Wherefore, the defendants say that the plaintiff is not entitled to any of the relief prayed for in the complaint in that said complaint is insufficient in law to maintain its action and that the same and each and every paragraph thereof should be dismissed at plaintiff's costs (Rec. 12, 13).

Thereafter, the Court ordered briefs to be filed by both sides, and after consideration of the same by the Court, an order was entered denying the motion to strike and dismissing the cause without prejudice to the right of the defendants to renew said motion on the same grounds at the end of the plaintiff's case on the trial of this cause (Rec. 15).

Thereafter, the defendants filed an answer in which they denied the allegations contained in paragraphs numbered 4 and 5 of the complaint and averred that any of the acts complained of were unauthorized by the said defendants, or were the said acts complained of incident to the employment of said guard, and further denied that any of the loss or injury complained of was done or caused by these

defendants, or through any of its agents or servants acting within the scope of their respective employment.

It further alleged that the complaint does not charge any act of negligence against the defendants or any one of them; that the complaint does not charge any damage was suffered by the plaintiff through the negligence of, or as a direct and proximate result of any negligence on the part of these defendants or any one of them; the complaint does not charge any breach of contract on the part of these defendants or any one of them; that the complaint does not charge any cause of action against these defendants or any one of them; that the complaint does not charge that the alleged damage sustained by the plaintiff was caused as a direct and proximate result of any negligence or breach of contract by any of the defendants' agents, servants or employees acting within the scope of such agent's, servant's or employee's authority or scope of employment.

There was never any claim in the Trial Court that the Defendants charged themselves with a duty or obligation to be performed which they did not perform, or performance which was rendered impossible by an Act of God.

Defendants, by their contract, plaintiffs' Exhibit 1 (Rec. 3, 82), agreed to furnish to the plaintiff a uniformed armed guard service consisting of five armed guards, or more as may be agreed upon from time to time between the parties, for the protection of its property, make suggestions to relieve hazards that are found to exist, and at all times endeavor to improve the service, and the parties hereto further agree "Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives." (Rec. 82).

The agreement further provided that the said defendants agreed to furnish uniforms and equipment, including side-arms, belts, holsters and badges without cost to the

said plaintiff and agreed to assume Social Security, Unemployment Taxes, etc.

The agreement further provided "The supervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company." (Rec. 3, 83).

The agreement further provided "It is further agreed that the wishes of said Apex Smelting Company will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined." (Rec. 4, 83).

The evidence showed that this contract has never been terminated and is still in full force and effect (Rec. 57).

Mr. William R. Bayer, who is the comptroller of the plaintiff corporation, testified that if any request was made to remove any guard, that the defendants would remove them, and further, that the plaintiff corporation prescribed all the rules and regulations under which the guards worked (Rec. 58).

It can be seen, therefore, from the contract between the parties, in evidence, and the method of procedure followed by the parties hereto, that all of the guards were supervised by the representative of the defendants, who in turn were responsible to a duly authorized representative of the plaintiff. Therefore, the guards were actually directed in their work, when employed on the premises, by the plaintiff herein.

The defendants were not negligent in any way in the hiring of the said Harry James Frontczak, who was the guard in question. The record shows that the said Harry James Frontczak was gainfully employed by the Govern-

ment of the United States in various capacities and had a good service record. The testimony further showed that the said Harry James Frontczak, because of some disagreement or fancied grievance against the plaintiff, deviated from his employment and set fire to the plant of the plaintiff, for which he was apprehended on the complaint of plaintiff's representative, tried and convicted in the Criminal Court of Cook County. It cannot be said that the action of the said guard in setting the fires was in any way connected with or in the scope of his employment so as to charge the defendants with a breach of their contract with the plaintiff.

The case of *Deibler* v. *Bernard Bros. Inc.*, 385 Ill. 610, 615, cited by the plaintiff in its Brief, pages 44, 67 and 68, is not in point. It that case, because of commercial frustration due to World War II, the defendants attempted to be relieved of their contractual liability under a lease for certain premises. The Court properly held that because the lease did not limit the use of the premises, as contended for by the defendants, the defendants could use the premises for other purposes, and therefore, because no automobiles could be sold, the premises could be used for other gainful purposes, and the decision further held that the lease was not terminated by reason of the war, but was in full force and effect.

Therefore, the principles outlined in the Deibler case cannot be a precedent for holding that where the defendants agreed to furnish guards to the plaintiff, which guards were under the supervision of the plaintiff and operated under rules and regulations of the plaintiff, that because a guard deviated from the duties imposed upon him, it could be said that the defendants were liable under the contract for the damage occasioned by the said guard outside the scope of his employment.

It is unusual to ask the Court of Appeals and this Court

to correct an alleged erroneous ruling by a Trial Court on a proposition of law which was never presented to it for hearing and determination, that is, the failure of the performance of the contract between the plaintiff and defendants, where, as a matter of fact, the plaintiff's entire theory in the Trial Court was on the theory of negligence on the part of Harry Frontczak, as an alleged agent and servant of the defendants, who occasioned damage when acting outside the scope of and not in the performance of his duties, and the entire argument of plaintiff's counsel in the Trial Court was directed to the theory of negligence, including the precedents cited in support thereof (Rec. 71-75, 79).

All of the other cases cited by counsel in his Petition for the allowance of the Writ have no bearing on the issues involved in this case. Counsel states that the District Court and the Court of Appeals were in obfuscation and confusion but there is nothing in the record to substantiate this charge. Apparently the only one suffering from obfuscation and confusion are counsel themselves. The issues in the Trial Court were clear and unmistakable. Counsel for the Plaintiff was asked by the Trial Court if he had anything further to offer or say. They held fast to their position of negligence and respondeat superior. The first inkling of any shift in their position was in the Court of Appeals, where they attempted to review for the first time an issue of contract and bailment. The Court of Appeals correctly decided that they could not review something which had not been presented to the Trial Court and in their opinion stated (Rec. 105, 106 and 107):

> "We agree with the lower court that there was no basis for recovery upon the theory of negligence. Plaintiff's evidence showed that Frontczak had been employed by the government in various capacities in handling its mail, finances, records and personnel during the time of war. Under such circumstances, we

think there was no negligence in his employment by defendants. More than that, plaintiff had an equal opportunity to observe his conduct, as well as that of all other guards, and it did not complain or request his removal. We also agree that in setting the fires he was not acting within the scope of his employment or in furtherance of the master's business. See *Boehmer* v. *Norton,* 328 Ill. App. 17, 21; *Horecker* v. *Pere Marquette R. Co.,* 238 Ill. App. 278, 281.

We need not pursue this negligence theory further, however, because it is no longer relied upon. Here, for the first time plaintiff advances the theory that defendants were liable for breach of contract. As already noted, no such breach was alleged in the complaint and the record is plain that such a theory was not relied upon below. Neither is the liberalized rule which permits the amendment of a pleading to conform to the proof of any benefit to plaintiff. No such amendment was proposed, but even if it had been we doubt if it could have been properly permitted in view of plaintiff's proof. As the court stated in *Hart* v. *Knox County,* 79 F. Supp. 654, 658:

'The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. * * * If this latter application of the rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one.'

Plaintiff's breach of contract theory is far fetched. It goes to the extent that the defendants by the contract were given complete custody and control of plaintiff's plant and likens the contract to one of bailment. The premise upon which this argument proceeds is, in our judgment, unsound. It must be remembered that by the terms of the contract 'Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives. * * * The su-

pervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company. * * * It is further agreed that the wishes of said Apex Smelting Comapny will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined.' As stated by the court below, 'Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly.' Thus, not only did the plaintiff under the terms of the contract retain possession and control of its premises but it retained a large measure of control over the guards furnished by the defendants, including Frontczak.

Finally, if we were impressed with the theory of liability argued before this court, which we are not, we would not be justified in reversing the judgment because the case was neither tried nor decided below on such theory. As was said in *Helvering* v. *Rubinstein*, 124 F. 2d 969, 972:

'The rule that an appellate court will not ordinarily consider questions not tried below is an important rule of appellate procedure and one which is usually not unjust to litigants. It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controveries. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation.' "

And as said by this Court in *Maloney* v. *Brandt*, 123 F. 2d 779, 782:

"It has long been a rule of practice that a reviewing Court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are

not entitled to hide a point in an obscure pleading and present it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon.

This rule announced in the *Maloney* case was cited with the approval by this court in *Chatz* v. *Midco Oil Corp.*, 152 F. 2d 153, 154. In fact, the cases are legion where the same or a similar rule has been announced and followed. *Thomas* v. *Taylor*, 224 U. S. 73, 84; *Cold Metal Process Co.* v. *Mc-Louth Steel Corp.*, 170 F. 2d 369, 380; *Hebets* v. *Scott*, 152 F. 2d 739, 741; *Saulsbury Oil Co.* v. *Phillips Petroleum Co.*, 142 F. 2d 27, 34."

The evidence as set out in the Petitioner's Brief is substantially correct and is therefore not repeated.

Petitioner has not shown to this Court by its Petition why the decision was erroneous or in conflict with the decisions of any other Court of Appeals or of any public importance nor have they shown any reason why the case should be subject to further review in this Court.

OPINIONS OF THE DISTRICT COURT AND COURT OF APPEALS.

The District Court's consideration and determination of this case are correctly set forth in its order directing the jury to find for the defendants and dismissing the case (Rec. page 81). They are not subject to the strained interpretation which Petitioner asserts and attempts to demonstrate from a consideration of the evidence, the pleadings in the case, the position of the respective parties, on theory the case was being tried were correctly determined by the Trial Court. In short, it was determined that under the evidence and the pleadings, the Plaintiff was solely relying on the theory of negligence and *respondeat superior* and was not relying on the contract, bailment or independent contract or theory as now asserted in the Court of Appeals and in this Court.

In the Court of Appeals, for the first time, the Plaintiff advanced a new theory, that is, of breach of contract and bailment to impose liability on the Defendants and has abandoned its theory of negligence.

The opinion of the Court of Appeals correctly interpreted the position of the respective parties on the trial of the cause and further, by its opinion, that the action of the Trial Court was correct.

THE TRUE ISSUE INVOLVED.

1. Was Harry Frontczak acting within the scope of his employment when he set the fires, to the extent that the employers are required under the doctrine of *respondeat superior* to make good any damages for a deliberate disobedience to orders.

2. Was Harry Frontczak on a lark of his own when he set the fires complained of and therefore acting outside of the scope of his employment.

3. Was Harry Frontczak acting within the scope of his employment when he committed the crime of arson, and were the employers liable for the damage occasioned by the commission of said crime.

4. Was there any negligence on the part of the said defendants which caused the damage complained of.

THE REASONS GIVEN BY PETITIONER FOR THE ALLOWANCE OF THE WRIT ARE WITHOUT MERIT AND ARE INSUFFICIENT.

1. The decision of the Court of Appeals in affirming the order and judgment of the District Court is not in conflict with the decisions of any Court of review or of this Court and correctly follows the established laws of the State of Illinois and of the United States.

The decision of the Court of Appeals in this case is not erroneous and correctly decided the issues presented to it for review.

ARGUMENT.

I.

There is no question but that the law of the State of Illinois is to be applied to the case at bar and respondents have never contended that any other laws were applicable.

II.

Point Two (2) of Petitioner's Brief Pages 49-57:

Petitioner's arguments under this point are directed to the proposition that there was a contract between the parties and that as a result of the contract, plaintiffs are liable to it irrespective of the charges made in complaint filed in this cause on which recovery is predicated.

None of the cases cited under Point II by the Petitioners are applicable to the facts in this case. There was never any claim or argument in the Trial Court that the Plaintiff was seeking to recover on the contract but the entire theory in the Trial Court was one of negligence of an alleged agent or servant of the Defendants.

As a matter of fact, this change in theory was first made on appeal, and was so recognized by the Court of Appeals in the opinion, and stated that the plaintiff had abandoned its theory of negligence and have now relied on a theory of contract, and that theory was far fetched.

We cannot understand by what stretch of the imagination, evidence or pleadings, the charges of Petitioner that the courts are in confusion as to what they were trying to do.

The only relation of the parties in this law suit was not on contract but the question of liability for the alleged

negligence or wilful conduct of one of the defendant's servants.

The authorities cited by the Petitioner failed in every particular to carry out the theory which they promulgated in the Trial Court and has no application to the evidence and pleadings in the record.

III.

Point Three (3) of Petitioner's Brief, Pages 57-63:

Petitioners argument under this point is directed to the form of pleadings under the rules of Civil Procedure. We have no quarrel with the rules or with the cases cited thereunder, however, before there can be any recovery, a charge must be made in a complaint upon which recovery can be predicated.

In the case of *Hart* v. *Knox County*, 79 F. Supp. 654, 658, the court said:

> "The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won but to jeopardize and perhaps to overthrow a judgment they have lost. * * * If this latter application of the rule were permitted a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one."

In the case of *Helvering* v. *Rubinstein*, 124 F. 2d 969, 972, the court said:

> "The rule that an appellate court will not ordinarily consider questions not tried below is an important rule of appellate procedure and one which is usually not unjust to litigants. It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation."

In the case of *Maloney* v. *Brandt*, 123 F. 2d 779, 782, the court said:

> "It has long been a rule of practice that a reviewing Court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are not entitled to hide a point in an obscure pleading and present it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon."

The rule in the *Maloney* case was cited with approval in the case of *Chatz* v. *Midco Oil Company*, 152 F. 2d 153, 154.

The same rule was announced in *Thomas* v. *Taylor*, 224 U. S. 73, 84; *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 170 F. 2nd 369, 380; *Hebets* v. *Scott*, 152 F. 2d 739, 741; *Saulsbury Oil Co.* v. *Phillips Petroleum Co.*, 142 F. 2d 27, 34.

IV.

Point Four (4) Petitioner's Brief, Pages 63-71:

The argument made by Petitioner under this point has no application to the case at bar in that they are arguing a proposition which was not presented to the Trial Court and which they tried to present to the Court of Appeals and their claim was rejected.

V.

Point Five (5) Petitioner's Brief, Pages 71-92:

As we have previously stated in our argument, here is an employee of the Defendants, partially directed by each of the parties hereto, who commits a crime outside the scope of his employment.

Petitioner under this point selects parts of sentences in parts of the contract and attempts by innuendo to find a phrase or word which would make the Defendants liable for the unauthorized act of an unfaithful servant. The contract in question if it is to be considered at all, must be read and construed in its entirety. Here, the defendants were obligated to furnish men, uniforms, side-arms, for those hours and over those periods of time as mutually agreed upon between the parties. The defendants were to pay the Social Security and other taxes. The guards, however, were to be guided by the rules and regulations promulgated by the petitioner, and not by the defendants. The supervision of the guards was to be the responsibility of a designated representative of the defendants, who in turn was responsible to and received instructions from the designated representatives of the petitioner. Not only that, but if the petitioner desired that any of the guards assigned to the plant by the defendants be removed and replaced, the said defendants were obligated to do so.

The Petitioners did not show by a scintilla of evidence in the record, or by any charge made in the complaint filed, that the defendants were negligent in any way in the hiring of the guard, or in any other manner, or that their agents and servants, within the scope of their employment, were negligent in any way, causing the damages complained of.

The authorities cited by the Petitioner under this Point of its Brief are not analogous to the situation herein involved. They cite the case of *Vannah* v. *Hart Private Hospital,* 228 Mass. 132, 117, N. E. 328, 329, 330, in which a person who is in surgery under the influence of ether and had a ring stolen from her finger by one of the nurses, and the hospital was held liable because they agreed to give the plaintiff in that case such services as were necessary and proper while under the influence of ether, so that they stood

in an entirely different contractual situation than do the defendants in this case.

Petitioner cites the case of *Evans* v. *Williams*, 232 Ill. App. 439, 443, which is no authority for the proposition Petitioner contends for, because the bailee's servant, without authority to do so, took the bailor's car out for a "joyride" and wrecked it. The decision in that case rested wholly upon the question of negligence and in no way involved a crime of a servant.

The Petitioner contends that the plant was turned over to the defendants under the contract in question and contends, therefore, that under the *Evans* case cited by it, the defendants became the bailors of the Petitioner's plant. This is so far fetched that it requires no answer except to say that under the contract the defendants merely furnished men to the Petitioner, and it directed the entire operation, and it was in charge of and had exclusive control of its own plant, and not the defendants.

To the same effect are all of the other authorities cited by the Petitioner under this point on the question of bailments. No question of bailment is involved in the case before the Court. In this case the defendants agreed under their contract to furnish guards and uniforms to the Petitioner, and the plant and property, and even the guards furnished, were under the jurisdiction, direction and control of the Petitioner, and not of the defendants, and certainly, there was no bailment of the premises to the plaintiff, especially at the time of the fire.

VI.

Point Six (6) Petitioner's Brief, Pages 93-112:

Petitioner argues under this point that the respondents were independent contractors and that there was no divided control. This is so far from the evidence adduced or the

pleadings in the case as to require no answer. The Court of Appeals correctly stated that the new theory of contract advanced by the Petitioners was far fetched. The authorities cited under this point are not in point or authority for the proposition advanced by the Petitioner and requires no further reply.

VII.

Point Seven (7) Petitioner's Brief, Pages 112-117:

Petitioner did not make out a prima facie case as a matter of law, by showing that Harry Frontczak set the fires that caused the damage in Petitioner's plant, unless as a matter of law the said Harry Frontczak was acting within the scope of his employment, and it was not necessary for the Defendants as a matter of law to make excuses or justifications for the unauthorized act of Harry Frontczak, if any existed.

Petitioner cites the case of *Johnson* v. *Barber*, 10 Ill. 425, 431, as authority for the proposition advanced under this point. However, the said case holds contrary to the Petitioner's contention. That case holds as Defendants have contended in the trial Court and in the Court of Appeals and now contend. The Court said in that case on page 431:

> "If one of the Defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences; but if he set out the fire from motives of malice or wantonness, the principal would not be liable, for that would be an abandonment of the business of the agency. The instruction, as modified by the court, stated the law correctly."

The other cases cited by counsel under this point do not support their position.

VIII.

Point Eight (8) Petitioner's Brief, Pages 118-126:

We cannot see how counsel for Petitioner contends that the theory in the District Court and in the Court of Appeals and in this Court is one of contract and that they did not rely on the negligence theory. The Petitioner did not at any time during the proceedings in the Trial Court rely on contract. The Petitioner in its complaint did not make a charge against the defendants of any negligence, or that the act complained of was done by any of the defendants' agents or servants in the course of, or in the scope of their employment. The evidence adduced by the Petitioner on the trial of the case did not show any negligence, as a matter of law, on the part of the defendants, either in the hiring of the said Harry James Frontczak, or that any act that he did was done in the furtherance of the master's business. As a matter of fact, the evidence showed to the contrary, that the defendants, as a matter of law, hired this guard after they had found that the said guard had been employed by the Government in various capacities; that employment with the Government over a period of time handling the Government's mail, the Government's finances, the Governments' records, and the Government's personnel, during time of war, was a sufficient recommendation for the defendants to employ this particular guard. The Petitioner, who had more of an opportunity to observe the conduct of this guard, and all the other guards, did not complain, nor did they request his removal. Where, then, can it be said that the defendants were negligent? Further, the contention of the Petitioner that the guard set these fires in the scope of, or in the course of his employment or furthering the business of the employer, is so far fetched that it does not require any answer. There can be no question in the record before the Court that the

guard deviated from the course of, and the scope of his employment; that when he set these fires he committed a felony, for which he was indicted on the complaint of the Petitioner in this case, and tried and convicted. Can the defendants be held to answer for the crime of the said Harry Frontczak when it was not done in the furtherance of the masters' business? The Courts have repeatedly held and as ably stated by the Appellate Court of Illinois, in the case entitled *Boehmer* v. *Norton,* 328 Ill. App. 17, 65 N. E. 2nd 212, at page 214:

> "The law is well stated in the following excerpt from Sec. 556, Vol. 35, American Jurisprudence:
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> When the deviation and its purpose are not in dispute, and it appears beyond reasonable controversy that the purpose had no connection with the duties of the servant, there is no liability, and it is the duty of the court to dismiss the action or direct a verdict, or, if a verdict has been rendered in favor of the plaintiff, to set is aside on motion. On the other hand, in cases where the deviation is slight and not unusual, the court may, and often will, as a matter of law, determine that the servant was still executing his master's business. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such question."

In the case of *Horecker* v. *Pere Marquette R. Co.,* 238 Ill. App. 278, at page 281, the court said:

> "In Wood on Master & Servant, sec. 286, p. 552, the author says: 'A Master is liable for the act of his servant, done in the course of his employment about his master's business. But he is not responsible for an act done outside of his employment, nor for the wanton violation of the law by him.' The author further says, sec. 307, p. 585: 'By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistical to his orders.

The simple test is, whether they were acts within the scope of his employment,—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.' In 3 Elliott on Railroads (3rd Ed.), pp. 892-95, sec. 1805, in treating of the liability of a railroad company for acts of its employees to others than passengers, the author says: 'The general rule is that a master is liable for the wilful acts of his servants if done in obedience to the master's order or within the scope of their employment or line of their duty, but not otherwise. * * * If an employee steps aside from the line of his duty and commits an independent tort on his own account and outside of the scope of his employment the master is not liable therefor. Thus a railroad company is not liable for injuries inflicted by an employee in a purely personal quarrel with one between whom and the corporation there is no connection or privity, nor for an assault by a trainman on one who had been a passenger but had left the train and ceased to be a passenger at the time of the assault.' In the above quotations from the two textwriters are set forth what is substantially, as we understand it, the law in Illinois and other jurisdictions. (*Oxford* v. *Peter*, 28 Ill. 434, 435; *Johanson* v. *Johnston Printing Co.*, 263 Ill. 236, 240; *Illinois Cent. R. Co.* v. *Ross*, 31 Ill. App. 170, 182; *Stephenson* v. *Southern Pac. Co.*, 93 Cal. 558, 561; *Central Ry. Co.* v. *Peacock*, 69 Md. 257, 262; *Genga* v. *Director General of Railroads*, 243 Mass. 101, 106; *Kinnomen* v. *Great Northern R. Co.*, 34 N. Dak. 556, 565; *Roberts* v. *Southern R. Co.*, 143 N. C. 176, 181; *Turner* v. *American Dist. Telegraph & Messenger Co.*, 94 Conn. 707, 713; *Bowen* v. *Illinois Cent. R. Co.*, 136 Fed. 306.) In the *Johanson* case, *supra*, our Supreme Court says: 'Outside of the scope of his employment the servant is as much a stranger to his master as any third person, and an act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master. If the servant step aside from his master's business for some purpose

wholly disconnected with his employment the relation of master and servant is suspended. The act of the servant during such interval is not to be charged to his master.' In the *Bowen* case, *supra,* decided by the U. S. Court of Appeals for the 8th Circuit, the distinction is pointed out, as affecting a master's liability, between an act done by a servant during his employment, and an act done by him within the scope of his employment, and attention is directed to the further distinction to be observed, as to the liability of the master for the wrongful act of the servant, between cases where the relation of carrier and passenger, or of a hotel keeper and his guest, exists, and cases where the master is the proprietor of a business house or railroad station and the persons injured by the servant's wrongful act comes upon the premises to transact some matter connected with the master's general business.

In view of the above authorities and the undisputed facts of the present case, we are of the opinion that the defendant railroad company is not liable for the injuries received by plaintiff in the manner shown, and that the circuit court committed errors of law in refusing on defendant's motions to direct a verdict in its favor and in entering the judgment appealed from, or any judgment, against it. It seems clear to us from the evidence that the wrongful assault of the two gatemen was without the scope of their employment or duties, and, as said in the *Genga* case, *supra,* was committed by them 'in a spirit of vindictiveness, or to gratify personal animosity or to carry out an independent purpose of their own'; and that the judgment appealed from should be reversed without remanding the cause. Such action is proper where this Appellate Court reverses a judgment 'for errors of law which cannot be obviated or cured on another trial.' (*Harty Bros. & Harty Co.* v. *Polakow*, 237 Ill. 559, 567.)"

From the record made in the Trial Court the Court had no alternative but to find, as a matter of law, that the

Petitioner had not made out a prima facie case, and that the court was duty bound to take the case from the jury and direct the jury to find the defendants not guilty and dismiss the suit. There was no factual issue to be tried, and therefore, if the Court had refused to grant the motion to direct the jury, the Court would have committed error, and even if the jury had returned the verdict for the Petitioner, as a matter of law, the verdict would have had to be set aside.

All of the cases cited on this point were cases where a prima facie case had been made out on questions of fact, and in those cases, the Court would have erred to direct a verdict, but in a case as the case before this Court is, where, as a matter of law, there was no liability, the Court was duty bound and did grant the motion of the defendants.

Conclusion.

The Petition for Writ of Certiorari fails to demonstrate any valid reason as to why this case should be the subject of further review. We, therefore, submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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